Supreme Court, U.S.
FILED

No. 091372 MAY 10 2010

OFFICE OF THE CLERK

In the

Supreme Court of the United States

MEDISON AMERICA, INC.,
a California corporation,
Petitioner,

v.

PREFERRED MEDICAL SYSTEMS, LLC,
a Tennessee limited liability company;
JERRY K. MCGUIRE AND GREGG REED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LARRY E. PARRISH
Counsel of Record
Parrish and Shaw
An Association of Attorneys
775 Ridge Lake Boulevard
Suite 145
Memphis, Tennessee 38120
(901) 766-4388
parrish@parrishandshaw.com

Attorney for Petitioner

May 10, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I. Must a federal court, sitting in diversity and hearing a summary judgment motion, apply state law when state law imposes a higher burden of proof on a movant and preserves the constitutional rights of a nonmovant to a state-created remedy via trial by jury?

II. Whether the United States Court of Appeals for the Sixth Circuit, applying the holding in *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989) (hereinafter "*Street*"), misinterpreted this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (hereinafter "*Celotex*") as authorizing entry of a summary judgment in favor of a party who merely asserts that the nonmovant lacks admissible evidence on an essential element of its claim, i.e. allowing the Respondent to prevail under a "put up or shut up" theory.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner, Medison America, Inc., pursuant to Rule 29.6, states that it is a privately held company. There is no publicly held corporation that owns more than 10% of its stock.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings and
Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities vii

Opinions Below 1

Jurisdiction 1

Relevant Constitutional Provisions Involved 1

Statement of Case 2

Reasons for Granting the Petition 6

1. Application of inapposite standards created by constitutionally unjustifiable classifications of substantive rights as procedural, in diversity cases, is recreating federal common law in violation of the Erie Doctrine, and this illegitimate encroachment is an ever-expanding federalism that plays havoc with federal-state comity. This currently increasing encroachment often occurs, as it occurred in the instant case, in the context of summary judgment practice . 6

2. As the case most impacting substantive practice of law in federal courts, *Celotex's* ambiguous language has created confusion in and among the Circuit Courts of Appeals and the lower courts. The majority of confusion results from the "myths" created by misinterpreting *Celotex*; the most popular of which is the "put up or shut up" standard ... 20

Conclusion 36

Appendix

App. A: Opinion, United States Court of Appeals for the Sixth Circuit, filed December 18, 2009 ..... 1a

App. B: Judgment in a Civil Case, United States District Court Western District of Tennessee Western Division, filed November 19, 2007 13a

App. C: Order Granting Defendants' Motion for Summary Judgment, United States District Court Western District of Tennessee Western Division, filed November 16, 2007 15a

App. D: Order denying Petition for rehearing en banc, United States Court of Appeals for the Sixth Circuit, filed February 9, 2010 ..... 53a

App. E: Constitutional Provisions/ Treaties/Statutes Involved in this case 55a
U.S. Const. amend. V 55a
U.S. Const. amend. X 55a
U.S. Const. art. VI 55a
28 U.S.C. § 1331 ..... 56a
28 U.S.C. § 1332(a)(1) 56a
Rules Enabling Act,
28 U.S.C. § 2072 ..... 57a
28 U.S.C. § 2073 ..... 57a
28 U.S.C. § 2074 (a) 58a
Lanham Act,
15 U.S.C. § 1125(a)(1) 58a
TRCP Rule 56 and FRCP Rule 56 Comparison Chart 59a
TCA § 47-18-104(7), (8) and (27) .. 66a
TCA § 47-18-109(a)(1), (a)(3) and (c)(1) 67a
TCA § 47-25-101 ..... 67a
TCA § 47-25-104 ..... 68a
TCA § 47-25-105 ..... 68a
TCA § 47-25-106 ..... 69a
OGCA § 10-1-372 ..... 69a
MCA § 75-21-1 ..... 71a
MCA § 75-21-9 ..... 73a
MCA § 75-24-5 ..... 73a
MCA § 75-24-15 ..... 76a
15 U.S.C. § 1121 ..... 77a
Fed. R. Civ. P. 54(a) 78a
Fed. R. Civ. P. 58(b) 78a

App. F: Plaintiff's Response to the Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment, United States District Court Western District of Tennessee Western Division, filed August 18, 2007 . . . . . 79a

TABLE OF AUTHORITIES

Cases

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 29

Anderson v. Liberty Lobby Inc.,
477 U.S. 242 (1986) 12, 24, 35

Beard v. Banks,
548 U.S. 521 (2006) 36

Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,
276 U.S. 518 (1928) 11

Byrd v. Blue Ridge Rural Elec. Coop.,
356 U.S. 525 (1958) 13, 36

Catrett v Johns-Manville Sales Corp.,
826 F.2d 33 (D.C. Cir. 1987) cert. den., 484 U.S. 1066 (1988) 33

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) ..... *passim*

Clark v. Coats & Clark, Inc.,
929 F.2d 604 (11th Cir. 1991) 22, 23, 24

Clark v. Coats & Clark, Inc.,
990 F.2d 1217 (11th Cir. 1993) 23

Dresher v. Burt,
662 N.E.2d 264 (Ohio 1996) 11, 15, 21

Duplantis v. Shell Offshore, Inc.,
948 F.2d 187 (5th Cir. 1991) 23

Elkins v. Richardson-Merrell, Inc.,
8 F.3d 1068 (6th Cir. 1993) 15

Erie Railroad v. Tompkins,
304 U.S. 64 (1938) ..... *passim*

Gregg v. Georgia,
428 U.S. 153 (1976) 25

Hanna v. Plumer,
380 U.S. 460 (1965) 7, 8, 9, 10, 11

Hannan v. Alltel Publ'g Co.,
270 S.W.3d 1 (Tenn. 2008) ..... *passim*

In re Air Crash Disaster Near New Orleans,
821 F.2d 1147 (5th Cir. 1987) 36

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990) 35

Marks v. United States,
430 U.S. 188 (1977) 25, 26, 27, 34

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 24

Mills v. CSX Transp., Inc.,
300 S.W.3d 627 (Tenn. 2009) 12

Planters Mfg. Co. v. Prot. Mut.,
380 F.2d. 869 (5th Cir.) cert. den., 389 U.S. 930
(1967) 36

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000), ... 35

Ricci v. DeStefano,
___ U.S. ___, 129 S. Ct. 2658, 174 L. Ed. 2d 490
(2009) 36

Romano v. Oklahoma,
512 U.S. 1 (1994) 25

Russ v. International Paper Co.,
943 F.2d 589 (5th Cir. 1991) 23, 24

Scott v. Harris,
550 U.S. 372 (2007) 36

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
___ U.S. ___, 176 L. Ed. 2d 311 (2010) . . . *passim*

Shropshire v. Laidlaw Transit, Inc.,
550 F.3d 570 (6th Cir. 2008) 15

Skotak v. Tenneco Resins, Inc.,
953 F.2d 909 (5th Cir. 1992) 23

Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,
807 S.W.2d 476 (Ky. 1991) 10, 12, 15, 21

Street v. J.C. Bradford & Co.,
886 F.2d 1472 (6th Cir. 1989) . . . . . *passim*

Constitutional Provisions

Tenn. Const. art. 1, § 6 1
U.S. Const. amend. V 37

U.S. Const. amend. VII 6
U.S. Const. amend. X 14
U.S. Const. art. VI 14, 15

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 2
28 U.S.C. § 1332 2
28 U.S.C. § 2072(b) 14, 18

Rules

Fed. R. Civ. P. 50 16
Fed. R. Civ. P. 56 ..... *passim*
Fed. R. Civ. P. 56(c) 3
Fed. R. Civ. P. 56(e) 9, 20, 34
Tenn. R. Civ. P. 56 ..... 2, 6, 8, 9, 13
Tenn. R. Civ. P. 56.04 9

Other Authorities

Andrée Sophia Blumstein, "Bye, Bye Byrd? Summary Judgment After *Hannan and Martin*: Which Way to Go?" 45 Tenn. B.J. 23 (Feb. 2009) 10

Judy M. Cornett, "Trick or Treat? Summary Judgment in Tennessee after *Hannan v. Alltell Publishing Co.*" 77 Tenn. L. Rev. 305 (Winter 2010) 10, 11

Issacharoff and Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale L. J. 73 (1990) 23

Adam N. Steinman, "The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy," 63 Wash. & Lee L. Rev. 81 (2006) 20

OPINIONS BELOW

The opinion of the Sixth Circuit is unofficially reported as *Medison America, Inc. v. Preferred Medical Systems, LLC*, 2009 U.S. App. LEXIS 27977 (6th Cir. Dec. 18, 2009), and the opinion of the district court is reported as *Medison America, Inc. v. Preferred Medical Systems, LLC*, 548 F.Supp.2d 567 (W.D. Tenn. 2007).

JURISDICTION

The Sixth Circuit affirmed the order of the United States District Court for the Western District of Tennessee granting Respondent's motion for summary judgment on December 18, 2009. Petitioner filed a timely petition for rehearing with a suggestion for rehearing *en banc*. The Sixth Circuit denied Petitioner's petition to rehear by order entered February 9, 2010.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS INVOLVED

Tennessee Constitution, Article 1 § 6

> That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

The remaining provisions involved are included in the Appendix, including a side-by-side comparison of Tennessee Rule of Civil Procedure (Tenn. R.), Rule 56 and Federal Rule (Rule) 56 (A.59a).

STATEMENT OF CASE

Petitioner initiated the instant case by a sworn complaint, which was subsequently amended by another sworn complaint. Both complaints asserted jurisdiction under 28 U.S.C. § 1331 and § 1332. Petitioner's claims included state-law claims for fraud, slander, commercial disparagement, conspiracy to injure business, unfair trade practices, restraint of trade, conversion, tortious interference with business relations, and Lanham Act claims.

Respondents filed a Motion for Summary Judgment arguing Petitioner had no admissible evidence to support its claim that Respondents made disparaging statements in connection with "commercial advertising or promotion." In support of its motion, Respondents filed a statement of undisputed facts and a memorandum, including conclusory headings purporting to specify the motion's basis. The only evidence filed by Respondents in support of its motion was an affidavit of Respondent, Jerry Kirkland McGuire, which included a single conclusory statement regarding his own liability and a number of statements regarding the Respondent's liability, all of which were prefaced, "To the best of my Knowledge and belief."

In support of Petitioner's opposition to Respondents' motion, Petitioner filed six (6) depositions and five (5) affidavits, a memorandum, and responded to each of Respondent's undisputed facts. Petitioner's response to each of the undisputed fact paragraphs is in a side-by-side chart (A. 79a), citing to evidence in the record that disputes each fact contended by Respondents to be "undisputed."

Respondents thereafter filed a reply to Petitioner's response including further observations attacking the sufficiency of Petitioner's evidence. Ironically, Respondents relied on authority from this Court stated as follows:

> Once the movant shows that "there is an absence of evidence to support the nonmoving party's case," the nonmoving party has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
>
> ***
>
> Because Plaintiff has **failed to come forward with at least some evidence on every element**, through Dr. Sigman or the other witnesses, "the plain language of Rule 56(c) mandates the entry of summary judgment" in favor of Defendants. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). (emphasis added)

Thereafter, Petitioner filed a surrebuttal to Respondents' reply including discussion of direct/circumstantial evidence, truth, expert witnesses and the burden at summary judgment stage. The district court then filed a 41-page order granting a plenary summary judgment, which failed to address whether the movant had shifted the burden of responding to Petitioner and which took cognizance of the fact that there were disputes, yet proceeded to analyze the **sufficiency** of Petitioner's evidence (A. 15a).

The district court and the court of appeals below applied the Sixth Circuit's interpretation of Justice Rehnquist's opinion in *Celotex* as the controlling standard by which to review motions for summary judgment, without any regard for Justice White's concurring opinion. The Sixth Circuit's interpretation is most frequently cited to be that stated in *Street*, i.e., put up or shut up standard.

The district court explicitly cited *Street* as the controlling authority requiring it to shift the burden to Petitioner to submit admissible evidence proving each element of Petitioner's claims on penalty of summary judgment (A. 25a). Once the shift occurred, the district court was left to judge whether Petitioner presented sufficient evidence.

The district court cited *Celotex* and *Street* for the proposition that, for Respondent to shift the burden, all that was required was to point out that Petitioner lacked evidence to support an essential element of its case. With that proposition, the district court never analyzed whether Respondent adequately met its initial burden. This is typical for "put up or shut up" courts; a suggestion is enough.

The Sixth Circuit's opinion notes that Petitioner asserted the district court improperly shifted a burden to Petitioner that Petitioner was not required to satisfy. Particularly, the Sixth Circuit opined as follows (A. 9a):

> Medison first argues that the district court misallocated the burden of proof ... by requiring Medison to prove that summary judgment was improper.

As is becoming more prevalent, the Sixth Circuit did not cite *Street* and did not use "put up or shut up" phraseology. The Sixth Circuit did cite *Celotex*, quoting only a partial sentence as authority to affirm the district court's ruling that the burden shifted to Petitioner. This partial sentence was taken out of context; the Sixth Circuit wrote as follows (A. 9a):

> Here, ... [Respondent] 'point[ed] out to the district court that there [was] an absence of evidence to support ... [Petitioner's] case.' *Celotex, 477 U.S. at 325*. (both brackets next to ellipses added; other brackets in original).

The Sixth Circuit ruled that the district court did not misallocate the burden to Petitioner with nothing more than a partial quote from *Celotex*. With this passing examination, the Sixth Circuit joined the district court in analyzing evidence submitted by Petitioner without first analyzing whether Respondent met its initial burden.

Petitioner timely requested a rehearing *en banc*, which raised the *Erie* issue, and was an appropriate vehicle to raise this issue because the Tennessee Supreme Court case, with its retrospective effect, was not decided until after briefing was complete in the Sixth Circuit. The issue raised was, whatever the federal standard is, the courts below were prohibited by law from applying the federal standard in the instant case, and instead were required to apply the standard articulated in Tennessee law that explicitly disavows the Sixth Circuit's "put up or shut up" interpretation/misinterpretation of *Celotex*.

Petitioner contended below that "put up or shut up" is a misstatement of this Court's precedent and that the result of this misstatement was the misallocation of burdens as it related to Petitioner and Respondents and the denial of Petitioner's Seventh Amendment right to a jury trial.

REASONS FOR GRANTING THE PETITION

1. **Application of inapposite standards created by constitutionally unjustifiable classifications of substantive rights as procedural, in diversity cases, is recreating federal common law in violation of the Erie Doctrine, and this illegitimate encroachment is an ever-expanding federalism that plays havoc with federal-state comity. This currently increasing encroachment often occurs, as it occurred in the instant case, in the context of summary judgment practice.**

Whether federal or state decisional law controls, on a "point in dispute" relative to identical codified rules of procedure of a state and the United States, is a question of first impression before this Court. It is a recurring question of Constitutional dimension and extreme practical importance which only this Court can settle authoritatively.

As shown (A. 59a-65a), Tenn. R. 56 and Rule 56 are identical in material detail. Therefore, focus must be on the decisional law applying Rule 56 and that the decisional law does not amend or re-codify previous codification.

On October 31, 2008, the Tennessee Supreme Court decided *Hannan v. Alltel Publishing Company*, 270 S.W.3d 1 (Tenn. 2008) (hereinafter "*Hannan*"). *Hannan* explicitly referenced *Street's* put up or shut up standard, rejected it as Tennessee's standard, and disavowed all interpretations of *Celotex* except Justice White's insistence that, to carry its burden, the movant must "negate, if he can, the claimed basis for the suit." 477 U.S. at 328. *Hannan* held for a movant to shift any burden to a nonmovant, the movant must affirmatively negate the existence of an element of the nonmovant's claim by evidence, and until a movant has so negated, a nonmovant can stand mute and prevail under Tennessee law.

In *Hanna v. Plumer*, 380 U.S. 460 (1965) (hereinafter "*Hanna*"), this Court decided that *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) (hereinafter "*Erie*"), in the context of the Rules Enabling Act (REA), is a different question from *Erie* without REA context.

This Court stated as follows in *Hanna* (380 U.S. at 471):

> The line between 'substance' and 'procedure' shifts as the legal context changes. 'Each implies different variables depending upon the particular problem for which it is used.'(citations omitted). It is true that both the **Enabling Act** and ***Erie* Rule** say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law but from that it **need not follow that these tests are identical**. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules,

> the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor Constitutional restrictions (footnote omitted) (emphasis added).

Without the REA, *Erie's* application focuses on the Rule of Decisions Act (hereinafter "RDA"), which heavily shifts the weight in favor of state law, unless there is a strong federal interest that overpowers applying state laws. As the *Hanna* Court put it, with respect to earlier cases in which state law was held to apply,

> "[t]here being no Federal Rule which covered the **point in dispute**, *Erie* commanded the enforcement of state law." (emphasis added) (380 U.S. at 470)

In the instant case, Rule 56 and Tenn. R. 56 are identical in all material respects; there is no conflict. What has occurred is the separate courts of last resort of two separate sovereigns (Tennessee and the United States) have visited the exact same codified rule, and have interpreted the dictates thereof in ways that are argued by some persons to be mutually inconsistent.

What conflicts here is nothing touched by the REA, as the conflict is between state/federal decisional law, in a context of an interpretation of a "Federal Rule,"

the common law of Tennessee (as articulated in *Hannan*), and decisional law created by *Street*.

While the instant case involves summary judgment practice, which is normally codified as procedural, the conflict here is not codified by the REA, any other codification process, nor has the "Advisory Committee" or "Congress" ever had input in this "point in dispute." Therefore, the reasons underlying REA deference are inapplicable here; respectfully, Petitioner contends that the "point in dispute" is a RDA question.

The instant case is a situation where the "point in dispute" is not between Rule 56 and Tenn. R. 56, but between federal/state decisional law interpreting the rules of civil procedure. Neither rule states whether a motion for summary judgment movant must present evidence that negates the existence of elements of a nonmovant's claim. Likewise, neither rule addresses whether merely filing a motion for summary judgment allows a movant to force a nonmovant to satisfy Rule 56(e) or Tenn. R. 56.04.

Similarly, neither rule addresses whether a nonmovant must submit evidence in a form admissible at trial on every element of each claim or must merely submit some evidence that raises a genuine dispute as to evidence relied on by a movant.

All of these issues are addressed only in decisional law from federal and Tennessee courts, making the conflict between state and codified federal law existing in *Hanna*, nonexistent in this case, making the REA inapplicable.

Analyzing this conflict under "the twin aims of Erie" demonstrates that State law must control here. First, application of federal law leads to forum shopping, as two commentators have noted.[1] The movant's burden of proof on summary judgment is not a "'substantial' variation[ ] between state and federal litigation," *Hanna*, 380 U.S. at 467-468, that is unlikely to "influence the choice of a forum." *Id.* Instead, the ease with which a movant can carry its burden of forcing the nonmovant to produce evidence prior to trial is a "nonsubstantial, or trivial, variation[ ]," *Id.*, that would motivate a litigant to seek the most advantageous forum. See *Cornett* at 348 (discussing defendant's incentive to remove to federal court to enjoy advantages of federal burden of proof and plaintiff's incentive to craft lawsuits to prevent removal to enjoy advantages of state burden of proof.) Summary judgment has become such an important stage on the journey to a remedy via a jury trial that the ease of obtaining or defeating summary judgment can determine a litigant's choice of forum at the inception of the suit. Especially in the Sixth Circuit, whose misinterpretation of *Celotex* raises an almost insurmountable barrier for nonmovants, forum shopping is an acknowledged fact of life.

Nor is this forum shopping confined to Tennessee litigants. Two other states in the Sixth Circuit-Kentucky and Ohio-have rejected the *Celotex* standard as it exists in the Sixth Circuit. See *Steelvest, Inc. v.*

---

[1] Andrée Sophia Blumstein, "Bye, Bye Byrd? Summary Judgment After *Hannan and Martin*: Which Way to Go?" 45 Tenn. B.J. 23, 27 (Feb. 2009); Judy M. Cornett, "Trick or Treat? Summary Judgment in Tennessee after *Hannan v. Alltell Publishing Co.*" 77 Tenn. L. Rev. 305 (Winter 2010) (hereinafter "Cornett").

Scansteel Service Center, Inc., 807 S.W.2d 476, 483 (Ky. 1991) (summary judgment) "should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant."); *Dresher v. Burt*, 662 N.E.2d 264, 274 (Ohio 1996) ("The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the non-moving party has no evidence to prove its case.")

Indeed, this *Erie* problem is not confined to the Sixth Circuit. According to one commentator, as least seven other states-Alaska, Connecticut, Florida, Indiana, New Mexico, Oklahoma, and Texas-impose a higher burden of proof on summary judgment movants than does the federal standard. See *Cornett* at 344, 349.

Second, this conflict between state and federal law leads to "inequitable administration of the laws." *Hanna*, 380 U.S. at 468. Just as in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), the litigant who happens to be diverse from the other litigant is given an unfair advantage by virtue of its access to federal court. A defendant in federal court can defeat a state-created remedy simply by virtue of being diverse from the plaintiff.

The whole purpose for diversity jurisdiction is to create a shield to protect the non-resident litigant from not being provided equal Tennessee justice; diversity jurisdiction was not enacted to create a sword for a non-resident by which to deny a Tennessee litigant equal Tennessee justice.

Nor is this advantage merely "procedural." This Court has explicitly referenced motion for summary judgment proceedings as involving a "substantive" evidentiary standard. *Anderson v. Liberty Lobby*, 477 U.S. 242, at 252, 254, 255 (1986). Similarly, this Court has referred to "burdens of proof" as "substantive." See e.g., *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, ___ U.S. ___, 176 L. Ed. 2d 311 (2010) (Stevens, J, concurring in part and concurring in the judgment). The summary judgment burden of proof at issue here may not be the sort of "seemingly procedural rule[] that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim." *Id.* at 331.

Most importantly, the summary judgment burden of proof is substantive because it determines access to a state-created remedy, guaranteed by both the state and federal constitutions. Without access to a trier of fact, there can be no remedy for a litigant. The Tennessee Supreme Court recently affirmed the importance of access to the trier of fact in explaining why it adopted the higher burden of proof in *Hannan*:

> By imposing this burden of production on the moving party, Rule 56 precludes summary judgment from disposing of issues of material fact. *Cf. Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991) ("[R]uling on a summary judgment ... requires a greater judicial determination and discretion since it takes the case away from the trier of fact before the evidence is actually heard."). *Mills v. CSX Transp., Inc.*, 300 S.W.3d 627, 631 (Tenn. 2009).

Furthermore, because granting summary judgment preempts the nonmovant's right to a jury trial, summary judgment practice is so intertwined with an important substantive right, i.e. access to a jury trial, that Tennessee's decisional law must displace federal decisional law. This is dictated by *Erie* and the RDA. This case is the converse of *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958). There, the state law limited access to the jury, which this Court found inconsistent with the "influence-if not the command-of the Seventh Amendment." *Id.* at 537. Here, the federal burden of proof on summary judgment unduly limits a litigant's access to the jury in diversity cases, resulting in unfairness that violated the *Erie* doctrine.

Considering Justice Stevens' concurring opinion and the 4-Justice dissenting opinion in *Shady Grove* (i.e., the touchstone for whether a state law is substantive is discerned by looking to state law) combined with *Hannan's* purpose to remove constraints that block access to the substantive right to a jury, it is reasonable to predict that *Shady Grove* evidences that *Erie*, as seen by at least a 5-Justice consensus, requires that *Hannan* displace *Street*.

If decisional law interpreting codified law is considered merged so that, in practical effect, the codification is amended by the decisional law, Rule 56, as amended by *Street*, and Tenn. R. 56, as amended by *Hannan*, are in direct conflict, and the clash required for REA to be applicable exists.

If this Court rules that *Celotex* or a new rule announced by this Court requires the same standards

as *Hannan*, the conflict created by *Street* dissipates, and neither REA nor RDA is implicated.

But, if this Court affirmed *Street's* put up or shut up standard as the federal courts' uniform standard, the direct conflict between codified rules of procedure would exist, invoking REA. Then the question becomes whether REA, § 2072(b), requires *Hannan* displace *Street* in diversity cases in Tennessee. Petitioner respectfully contends § 2072(b) so requires.

Subsection (b) of the REA mandates that a rule of civil procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). For the reasons discussed above, the movant's burden of proof is a substantive right, as is the litigant's right to a jury trial. If Rule 56, as interpreted by *Celotex*, does not impose the same burden of proof on movants as does state law, then Rule 56 abridges or modifies a substantive right and, hence, is invalid under the REA.

In essence, the conflict is between the Supremacy Clause and the Tenth Amendment. These separate parts of the Constitution, like every other, must be read *in pari materia* to avoid internal conflict. *Hannan* unambiguously states its purpose is to avoid litigants whose cause is governed by Tennessee law being encumbered in asserting a substantive and fundamental constitutional right, i.e., obtaining a state-created remedy via a trial by jury, by the put up or shut up standard (explicitly citing *Street* as a put up or shut up case).

For this Court to rule that REA authorizes an encumbrance the Tennessee Supreme Court so

explicitly and recently has ruled is not tolerated by Tennessee law would be catapulting the Supremacy Clause (Article VI 2) in derogation of the Tenth Amendment. This derogation would upset comity with no justifiable reason.

REA is not uniformly applied to displace state decisional law interpreting a substantively co-equal codified rules of federal procedure. Rule 50 is often displaced by state decisional law on directed verdicts.

The justification used in the Sixth Circuit for disregarding state law in summary judgment motions in diversity cases is characterized in *Shropshire v. Laidlaw Transit, Inc.*, 550 F.3d 570, 574 (6th Cir. 2008). *Shropshire* rejected a contention that Michigan summary judgment law controlled the outcome of a motion for summary judgment. Michigan is the fourth state that makes up the Sixth Circuit. So, even though there is no Michigan equivalent to *Hannan*, *Steelvest* and *Dresher*, it is clear that the Sixth Circuit pays no attention to conflicting Michigan law.

This split on the law that determines directed verdicts illustrates logical hypocrisy in federal decisions that trumpet the REA as the stated necessity for displacing state law. Petitioner contends that the Sixth Circuit's reasoning by which state law displaces federal law in directed verdict cases should demand the same result in motion for summary judgment cases; however, the Sixth Circuit is a circuit that applies state decisional law to decide directed verdicts and federal decisional law to decide motions for summary judgment. *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1072 n.4 (6th Cir. 1993).

Rule 50 is no less codified in federal rules of procedure than Rule 56; however, the Sixth Circuit finds no impediment prohibiting it from setting aside federal decisional law, in spite of the REA, to apply state decisional law to a motion for directed verdict.

This Court has never addressed if or why federal decisional law displaces state decisional law in directed verdict proceedings or why federal decisional law displaces state decisional law in motion for summary judgment proceedings in diversity cases.

The fact that this Court has not addressed either of these questions has not inhibited the Circuits from creating precedent on both subjects by professing to follow the exact same rulings of this Court. Only this Court can create uniformity at the federal bench on this rule.

In March 2010, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, ___ U.S. ___, 176 L. Ed. 2d 311 (2010) was decided.

As in *Celotex*, only by studying the concurring opinion can the holding be determined, because *Shady Grove* yields a 4-Justice opinion with a concurrence by a fifth Justice.

As explained in the concurring opinion and a 3-Justice Part of the plurality opinion, Justice Stevens agreed with the reversal and remand but for materially different reasons than the remaining Justices in the plurality. Thus, the holding is defined by the points of agreement among the five Justices making up the majority in favor of reversal.

That said, from Petitioner's perspective, the precedent and implication of *Shady Grove* seems clear; five Justices agree that the substantive-procedure dichotomy is the relevant touchstone for determining state/federal law displacement issues.

On the implication side, while not precedent, five Justices (concurrence and dissent) clearly agree **"that there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the state's definition of substantive rights and remedies."** *Shady Grove* at 329. The same five Justices agree that what is substantive in the state law scheme determines what is substantive, while the 4-Justice plurality opines that what is substantive is what federal law considers substantive.

An important consideration in the instant case is the fact that the Court, in *Shady Grove*, was presented with what Justice Stevens and the Justices making up the plurality considered to be to a direct conflict between a federal rule of procedure codified according to the REA and a contrary state codification of a New York rule of procedure (i.e., "§ 901(b) ... Rule 23 ... flatly contradict each other."). Again, the instant case does not have conflict between state and federal law, but has conflict between federal and state decisional law interpreting identical codifications of the same rule of procedure, emanating from two separate sovereigns.

The *Shady Grove* plurality implies that there might be nine Justices who would concur in a judgment that reverses the courts below in the instant case. The

following is from Part I § D of *Shady Grove's* plurality opinion (176 L. Ed. 2d 311, 328):

> We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce **forum shopping**. That is **unacceptable** when it comes as the consequence of **judge-made rules** created to fill supposed 'gaps' in positive federal law (citation omitted). For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, '**state law must govern** because there can be no other law.' (citations omitted) (emphasis added)

There could hardly be a more fitting description of the conflict at issue in the instant case.

In the 4-Justice plurality opinion of *Shady Grove*, there is a proposition which neither Justice Stevens' concurring opinion or the 4-Justice dissenting opinion takes exception. That proposition appears as follows (176 L. Ed. 2d 311, 321-22):

> Allstate asserts (and the dissent implies, *see post* at 3, 11) that we can (and must) *interpret Rule 23* in a manner that avoids overstepping its authorizing statutes (fn. 7 omitted). If the Rule were susceptible of two meanings-one that would violate *§ 2072(b)* and another that would not- we would agree. (italics in original)

The implication of this for the instant case is potentially case-dispositive. What is at issue is an identical rule, emanating from separate sovereigns,

that is susceptible to two meanings; Rule 56 should be read consistently with Tennessee state law in *Hannan*. This Court can respect both state and federal law by making it clear that *Celotex* requires a movant to negate an essential element of the nonmovant's claim. *Hannan* and *Street* reach opposite decisional law as to the same words. Thus, following *Shady Grove* this Court should interpret Rule 56 consistently with *Hannan's* interpretation of the identical state rule.

Additionally, the federal decisional law, in the instant case, is so split that it is difficult to know what the decisional law is in the federal judiciary. Because this Court has never addressed the subject, it is impossible for anyone to know whether this Court considers *Hannan* to be in conflict with what *Street* states is the decisional law in *Celotex*. Petitioner contends that the decisional law emanating from this Court's opinion in *Celotex* and the other trilogy cases is not in conflict with Tennessee law. The conflict is between *Street's* misinterpretation of this Court's decisional law and the decisional law of Tennessee.

2. As the case most impacting substantive practice of law in federal courts, *Celotex's* ambiguous language has created confusion in and among the Circuit Courts of Appeals and the lower courts. The majority of confusion results from the "myths"[2] created by misinterpreting *Celotex*; the most popular of which is the "put up or shut up" standard.

This Court has not undertaken a definitive analysis of motion for summary judgment practice in federal courts since 1986. From then to now, motion for summary judgment practice has evolved into something distinctly different from anything reasonably attributable to what this Court ruled in 1986 or since.

Specifically, the Sixth Circuit's "put up or shut up" standard was created and has been applied varyingly in United States district courts and in the Circuit courts as attributable to *Celotex* without comment or oversight by this Court. This standard is not only inconsistent with this Court's decision in *Celotex*, but it deprives nonmovants of the right to trial by jury in cases where correct application of *Celotex* would permit a trial.

Nowhere, in any decision by this Court, inclusive of concurring and dissenting opinions, has it used the terminology "put up or shut up" in describing the Rule 56(e) reciprocal burden of a nonmovant. Respectfully,

---

[2] Steinman, Adam N, "The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy," 63 Wash. & Lee L. Rev. 81 (2006).

to derive such words from this Court's opinions requires selecting snippets from the trilogy cases, and based thereon, creating a doctrine that is foreign to anything stated by any opinion of this Court.

Candidly, focusing on the initial burden of a summary judgment movant under Rule 56, as interpreted by this Court, requires a concession that the federal judge-made law is confused. As proof, the courts of last resort in three of the four states constituting the Sixth Circuit, independently and spread over a period of time, have published opinions with *stare decisis* effect rejecting the holding in *Celotex* for various reasons. See *Dresher*, 662 N.E.2d, at 269, 272; *Steelvest*, 807 S.W.2d, at 482-483; *Hannan*, 270 S.W.3d, at 6-9.

Importantly, there is a split among the Circuit Courts of Appeal stating significantly divergent views of what precedent *Celotex* yields.

While using the "put up or shut up" language clearly illustrates a Circuit has misread *Celotex*, some courts, such as the Sixth Circuit below, avoid using the strong language of *Street*, but still apply the put up or shut up standard when determining motions for summary judgment. Petitioner's research discloses that the Sixth Circuit, Seventh Circuit, Federal Circuit and Eleventh Circuit are the only Circuits that have taken a position regarding the "put up or shut up" standard. While the Sixth, Seventh, [3] and Federal Circuits have firmly adopted "put up or shut up," the

---

[3] According to LEXIS, put up or shut up is cited 19 times by the Seventh Circuit.

Eleventh Circuit firmly rejects it. Every other Circuit seems to bounce between accepting and rejecting "put up or shut up." This creates even more confusion among the Circuits when attempting to decipher which Circuit has correctly interpreted *Celotex* and which has misinterpreted *Celotex*.

Particularly, on whether and what a movant must present in order to shift the burden to a nonmovant, the various Circuits are split; also, some Circuits are split within themselves. For a litigant, this makes what the law is depend on the luck of the draw, i.e., which judges are assigned. Under these circumstances, competent counsel would be derelict in not forum shopping.

Street (Sixth Circuit) and *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991) (hereinafter "*Clark*") are opposites and illustrate inconsistent interpretations of *Celotex*. While *Clark* and *Street* produce diametrically opposite results, both panels claim the result each separately reaches is required by *Celotex*. Only this Court can pick which is correct or chart a new course.

Clark stated the following (929 F.2d at 606):

> The district court **misplaced** the **burdens** .... [t]his problem is **not uncommon in our circuit**. ...
>
> * * *
>
> *Celotex* did not change the general rule.
>
> * * *

> We can surmise that the [district] court believed *Celotex* changed the general rule ... .
>
> * * *
>
> We note that this **problem** apparently is **not limited to our circuit**. ... Issacharoff and Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale L. J. 73, 92 (1990). (emphasis added)

On remand, the same district judge, again, entered a summary judgment dismissing all claims after making a finding that the movant had carried the initial burden. On appeal, the court of appeals remanded and had to reassign the case, *Clark v. Coats & Clark, Inc.*, 990 F. 2d 1217, 1229 (11th Cir. 1993), because of the district judge's "strong language" in expressing dissatisfaction with *Clark*. Judicial emotion surrounds this issue still today.

With various permutations and equivocations, other Circuits wax and wane on various aspects of *Street* and *Clark*.

For example, the Fifth Circuit splits intra-Circuit, *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir. 1992) that cites *Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991) (following the Eleventh Circuit's opinion in *Clark*) then interprets the 4-Justice opinion just like *Street*, leaving out put up or shut up terminology. Complicating the issue further is the concurring members of the 3-judge panel in *Skotak* and Judge Wisdom, in dissent, taking exception to the *Skotak* opinion for the reasons stated in *Russ*, even though *Russ* is not cited. *Duplantis v.*

Shell Offshore, Inc., 948 F.2d 187, 190 (5th Cir. 1991) cites *Russ* but rules opposite from *Russ*.

There is a multitude of these contradictory rules prevailing in the federal judiciary at the same time. The impact is real and repeated, day-in-and-day-out in federal, trial and appellate courts.

Whether "put up or shut up" will control or the *Clark* approach will control in a given case is a crapshoot. It all depends on which judge is drawn in which district in which circuit. There is plenty "precedent" floating around to justify whatever a judge wishes to do. This reduces rule of law to rule of whomever the judge is on a given day in a given court and forces able counsel to forum shop.

After 24 years, confusion in the lower federal courts has entrenched to an intractable level, and nothing but this Court's intervention can straighten out the confusion. Only this Court can bring order out of this situation, and respectfully, this deserves resolution.

In March and June 1986, this Court filed the opinions *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Celotex* and *Anderson*. These three opinions are sometimes referred to as the "trilogy." Of the trilogy, only *Celotex's* opinions address what a movant must do to shift the burden to a nonmovant, thereby forcing a nonmovant to respond or suffer a summary judgment.

Celotex did not yield a majority decision but a 4-1-4[4] result, which controls what precedential value *Celotex* has.

As this Court stated in *Marks v. United States*, 430 U.S. 188, 192 (1977):

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds ... (ellipses in original)' *Gregg v. Georgia*, 428 U.S 153, 169 n. 15 (1976)... .

Applying this Court's language from *Marks* in understanding the *stare decisis* effect of *Celotex*, one must consult the concurring opinion of Justice White. Justice White's concurring opinion in *Celotex*, (477 U.S. at 328) included the following:

> **It is the defendant's [movant's] task to negate, if he can, the claimed basis for the suit.** (emphasis added)

The first paragraph of Justice White's concurring opinion is unambiguous (477 U.S. at 328):

---

[4] Although Justice White joined Justice Rehnquist's opinion, because he provided the fifth vote for the majority and also concurred separately on narrower grounds, the holding of *Celotex* can be only those points in Justice Rehnquist's opinion with which Justice White agreed. *Romano v. Oklahoma*, 512 U.S. 1 (1994). Therefore, for clarity, this Petition will refer to Justice Rehnquist's opinion as the "4-Justice opinion."

> I **agree** that the Court of Appeals was wrong in holding that the moving party must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I **also agree** that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute.

Justice White explains his concurrence in the remand as follows (477 U.S. at 328-29):

> Because the Court of Appeals found it unnecessary to address this [whether the nonmovant revealed enough to defeat the summary judgment] aspect of the case, I **agree** that the case should be remanded for further proceedings.

As Justice White did not agree with anything else in Justice Rehnquist's opinion, applying *Marks*, there are three holdings from the opinion in *Celotex* that have value as precedent. Those are:

- That a movant must not "**always**" support her/its/his motion for summary judgment with "affidavits" or "evidence" to show lack of a genuine issue;

- To support a motion for summary judgment, a movant is permitted to rely on "depositions, answers to interrogatories, and the like" to negate nonmovant's claims; and

- That the court of appeals should review to determine whether the movant carried its burden and/or nonmovant [in *Celotex*] established a genuine dispute.

The holding of *Marks* would be violated if *Celotex* is read to support a rule, agreed to by five Justices, that a movant can satisfy the initial burden without negating an essential element of a nonmovant's claim. Even if all four Justices in the 4-Justice opinion had explicitly stated that the burden shifts to a nonmovant when a movant suggests the absence of proof in the record, such unanimity of the four Justices would not be precedential because Justice White explicitly disagreed with this proposition.

While the 4-Justice opinion in *Celotex* gives no credence to the proposition that a motion for summary judgment movant can shift the burden to a nonmovant without first negating a nonmovant's claims by evidence, the 4-Justice opinion has been grossly misinterpreted to support such a proposition, by disregarding the *stare decisis* significance of Justice White's concurring opinion.

Chief Justice Burger, Justices White, Brennan, Blackmun and Stevens stated their opinion that, for a movant to shift the burden to a nonmovant, a movant must negate a nonmovant's claim(s) with evidence. Therefore, out of *Celotex* came the affirmative opinion that, until a movant brings evidence to court that negates a nonmovant's claim, the nonmovant is free to stand mute and prevail. The 4-Justice opinion did not take issue to the contrary.

To understand what this Court has opined about the necessity for a summary judgment movant to negate a nonmovant's claim, one must review *Celotex*. In *Celotex*, the following appears in the 4-Justice opinion (477 U.S. at 319):

> A divided panel of the Court of Appeals ... reversed, however, holding that petitioner's failure to support its motion with evidence tending to ***negate*** (italics in original) such exposure precluded the entry of summary judgment in its favor. (citation omitted).
>
> * * *
>
> [at 322] But unlike the Court of Appeals, we find no express or implied requirement in *Rule 56* (italics in original) that the moving party support its motion with affidavits or other similar material ***negating*** (italics in original) the opponent's claim.
>
> * * *
>
> [Justice White Concurring]
>
> [at 328] It is the defendant's task to **negate**, if he can, the claimed basis for the suit.
>
> * * *
>
> [Justice Brennan Dissenting]
>
> [at 331] If the burden of persuasion at trial would be on the *nonmoving* (italics in original) party, the party moving for summary judgment

may satisfy *Rule 56*'s (italics in original) burden of production in either of two ways. First, the moving party may submit affirmative **evidence that negates** an essential element of the nonmoving party's claim. Second, the moving party may **demonstrate** to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim (citation omitted).

* * *

[at 332] Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient.

* * *

[at 334] The opinion in *Adickes* (italics in original) [*v. S.H. Kress & Co.*, 398 U.S. 144 (1970)] has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence **to negate** the possibility that there was a policeman in the store. ... [T]he Court of Appeals apparently read *Adickes* (italics in original) this way and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of *Adickes* (italics in original) was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial (emphasis added)

The 4-Justice opinion in *Celotex* makes no statement that "**negating**" is not a prerequisite for a movant to shift the burden. Rather, the 4-Justice opinion merely states that "affidavits or other similar materials" are not required as the means of "**negating.**" The 4-Justice opinion leaves open a variety of means by which the movant's initial burden can be satisfied.

The *Celotex* concurring opinion of Justice White, unequivocally, opined that a prerequisite for the movant to shift a burden to the nonmovant is **negating** the nonmovant's "basis for the suit." The concurring opinion of Justice White agrees with the 4-Justice opinion that it is not "always" necessary for the movant to **negate** by "evidence or affidavits." The implication of the concurring opinion is that evidence or affidavits are sometimes required to **negate**. The 3-Justice dissenting opinion by Justice Brennan in *Celotex* makes a clearcut dichotomy.

Movant can **negate** a claim by affirmative evidence establishing that the nonmoving party cannot prove a claim or may **demonstrate** that the evidentiary record does not include any evidence by which the nonmovant can establish a claim.

Justice Brennan's 3-Justice dissenting opinion, like the 4-Justice opinion, does not eliminate the necessity of the movant **negating** the nonmovant's claim.

One additional fact relevant in the instant case, Justice Brennan's dissenting opinion includes the following (477 U.S. at 330):

> The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. **If** the ***moving*** (italics in original) party will **bear** the **burden** of persuasion **at trial**, that **party must support its motion with credible evidence** ... . (emphasis added)

Thus, it seems that, from *Celotex*, it can be reliably concluded that at least eight Justices agreed that a summary judgment movant must satisfy the prerequisite of negating the nonmovant's claim. The use of **"demonstrate"** by Justice Brennan's dissenting opinion, in context, is reasonably read to reference an alternative means by which to negate.

The concurring opinion of Justice White makes clear that negating always requires a movant to rely on evidence of record. The 3-Justice dissenting opinion of Justice Brennan requires a movant to present evidence to negate a nonmovant's claim on any point that the movant has the burden at trial. Though the 4-Justice opinion and the dissenting opinion of Justice Stevens do not address whether the prerequisite to negate can be satisfied other than by evidence of record (irrespective of its source), it would seem reasonable to conclude that the necessity of evidence is implied in both opinions.

An unanswered question that can only be answered by this Court is at the heart of the intractable inconsistency in federal courts that makes current summary judgment practice luck of the draw: Does "point to/show/demonstrate" describe a burden of a movant that is categorically different from negating? Petitioner suggests the answer is no, except in the

Sixth Circuit and other courts where "put up or shut up" standard prevails.

Put up or shut up chooses "point to/show/demonstrate" to describe a burden that allows the movant to merely inform the court that the evidence of record does not include admissible-at-trial evidence sufficient for the nonmovant to prove the essential elements of nonmovant's claim. Put up or shut up permits a movant to be successful by merely showing, demonstrating or pointing to a deficiency in nonmovant's evidence of record at the summary judgment stage. Put up or shut up relieves movants of any burden to negate elements of nonmovant's claim.

If "point to/show/demonstrate" only describe the means by which a movant must negate (prove the nonexistence) of an essential element of nonmovant's claim, the movant must either present evidence (affidavits or other materials) or by some other means inform the court that there exists facts that negate the existence of facts essential to the nonmovant's claim.

While the kind and source of the information establishing the nonexistence of facts essential to the nonmovant's claim can be infinite, the movant cannot be successful merely by showing, demonstrating or pointing to a pretrial deficiency in the nonmovant's pretrial evidence of record. And, until a movant affirmatively shows, points to or demonstrates the nonexistence of an essential fact, the nonmovant can stand mute, pretrial, and prevail.

As Justice White put it: "It is not enough to move for summary judgment ... with a conclusory assertion

that the plaintiff has no evidence to prove his case." (*Celotex*, 477 U.S. at 328).

The rule that unequivocally states that the movant must present evidence that negates and the non-put up or shut up approach in federal courts seems to differ only in the method, the source, and perhaps, the kind of information by which the movant must show, demonstrate or point the court to information that establishes the nonexistence of an essential fact that makes nonmovant's claim impossible to prove.

It is inconceivable how *Celotex* is cited for the proposition that a movant need only suggest a nonmovant has not come forward with evidence to prove an essential element thereby, shifting the burden to a nonmovant to prove the element pretrial or suffer summary judgment. Yet, following *Street*, this is exactly what both courts below did.

Once *Celotex* was remanded to the court of appeals, the court of appeals again reversed the summary judgment. Judge Starr wrote for the court of appeals, with Judge Bork dissenting. *Catrett v Johns-Manville Sales Corp.*, 826 F.2d 33, 40-42 (D.C. Cir. 1987) cert. den., 484 U.S. 1066 (1988).

Judge Bork based his dissent on the fact that the nonmovant had not submitted testimony of an eyewitness who had personal knowledge that plaintiff's deceased husband was exposed to asbestos. Judge Bork's dissent is the reasoning that gave birth to the Sixth Circuit's "put up or shut up" standard.

In 1989, three years after *Celotex*, *Street* parsed this Court's trilogy opinions and introduced the prior

use of the phrase "put up or shut up" into the law as a description of the Rule 56(e) reciprocal burden of a nonmovant, essentially ruling that the nonmovant must put up on the filing of a motion for summary judgment, sans evidence, much less evidence negating the claim of the nonmovant. The Sixth Circuit so ruled in spite of the fact that five *Celotex* Justices explicitly opined that for the burden to shift, the movant must present "evidence" that "negated" the nonmovant's claim, with the remaining four Justices taking no exception.

Street is the quintessential put up or shut up case that has a relatively lengthy opinion appearing to meticulously exegete the trilogy cases. Without a full comprehension of this Court's opinions in the trilogy cases, one would not recognize that *Street* rests on presuppositions not found in the trilogy cases; rather, *Street* ignores *Marks* altogether and references the 4-Justice opinion in *Celotex*, without reference to Justice White's concurring opinion. *Street* takes hold of the 4-Justice opinion's use of "point out" and "show" and creates a one-judge gauntlet to get to a jury.

In the Sixth Circuit, filing a motion for summary judgment with the suggestion that a nonmovant has no evidence in the record to establish each element of each claim forces the nonmovant to put up or shut up. A nonmovant must put up evidence that the district court deems admissible, then the judge reviews the admissible evidence to determine whether it is strong enough to withstand a post-trial motion for directed verdict. Below, the courts held that evidence must include proof of damages and a dollar amount. Like nothing else, put up or shut up forces the proverbial bench trial-before-the-trial.

As illustrated by the Sixth Circuit affirming the district court in the instant case, what the nonmovant is forced to put up is direct hard evidence, like the eyewitness testimony demanded by Judge Bork, dissenting, in the *Celotex* case on remand. In the world of put up or shut up, circumstantial evidence is hardly ever adequate for a nonmovant to defeat a motion for summary judgment.

This Court has left no doubt that a nonmovant in federal court is not required to "initiate any discovery" and "need not depose [any] of his witnesses or obtain their affidavits" to defeat a motion for summary judgment.

In the 24 years that have elapsed since the trilogy cases, this Court has not given credence to the *Street* notion that *Celotex* permits a motion for summary judgment movant to shift the burden to a nonmovant without providing evidence that negates the nonmovant's claim. Since *Celotex*, this Court has cited one of the trilogy cases in only five instances. In two of those cases, this Court made statements that slightly, but importantly, adjusted narrow issues relevant to summary judgment practice; in the other three, the references had no effect.

In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), *Anderson* is referenced (497 U.S. at 888), but just before the reference, *Lujan* states that, if the movant "specifically" avers facts and the nonmovant contradicts those "specifically" averred facts, the motion for summary judgment must be denied.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court apparently attempted

to fix a problem foretold by Justice Brennan when he, dissenting, opined that this Court had given inconsistent instructions to the federal judiciary. Justice Brennan noted that the Court weighing the evidence was verboten while at the same time instructing federal courts to assess the evidence for sufficiency by using quantitative/qualitative analysis. How is it possible to assess whether evidence is "sufficient" to persuade a "reasonable" juror without weighing the evidence?

The next opportunities this Court took to cite trilogy cases occurred in *Beard v. Banks*, 548 U.S. 521 (2006), *Scott v. Harris*, 550 U.S. 372 (2007) and *Ricci v. DeStefano*, ___ U.S. ___, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009).

CONCLUSION

For a litigant to be stopped at the gate and turned away from his/her/its right to a plenary trial before a jury has been considered an event of major significance for centuries. Ironically, on Seventh Amendment grounds, federal courts have refused to apply state law, in diversity cases, because to do so would deny litigants' access to a state-created remedy via trial by jury. *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1181, 1184 (5th Cir. 1987) (quoting *Byrd v. Blue Ridge*, 356 U.S. at 537, and *Planters Manufacturing Co. v. Protection Mutual*, 380 F.2d. 869, 871 (5th Cir.) cert. den., 389 U.S. 930 (1967)).

Put up or shut up, by whatever name, creates a wall between the litigant and the jury. Had Petitioner's claims been filed in Tennessee courts, Petitioner would have had access to a remedy via trial

by jury; for no reason other than that the diversity claims were filed in the district court below, Petitioner was forced to scale a put up or shut up wall that violated Petitioner's RDA rights, Equal Protection rights under the Fifth Amendment, Seventh Amendment rights, and rights inuring because of the Tenth Amendment.

Petitioner respectfully turns to this Court, as Petitioner's last resort, for rectification.

Respectfully Submitted,

LARRY E. PARRISH
Counsel of Record
Parrish and Shaw,
An Association of Attorneys
775 Ridge Lake Blvd.
Suite 145
Memphis, Tennessee 38120
(901) 766-4388
parrish@parrishandshaw.com

Attorney for Petitioner,
Medison America, Inc.

APPENDIX

APPENDIX

TABLE OF CONTENTS

App. A: Opinion, United States Court of Appeals for the Sixth Circuit, filed December 18, 2009 . . . . . 1a

App. B: Judgment in a Civil Case, United States District Court Western District of Tennessee Western Division, filed November 19, 2007 . . . . . 13a

App. C: Order Granting Defendants' Motion for Summary Judgment, United States District Court Western District of Tennessee Western Division, filed November 16, 2007 . . . . . 15a

App. D: Order denying Petition for rehearing en banc, United States Court of Appeals for the Sixth Circuit, filed February 9, 2010 . . . . . 53a

App. E: Constitutional Provisions/Treaties/ Statutes Involved in this case . . 55a
U.S. Const. amend. V 55a
U.S. Const. amend. X 55a
U.S. Const. art. VI 55a
28 U.S.C. § 1331 . . . . . 56a
28 U.S.C. § 1332(a)(1) 56a
Rules Enabling Act,
28 U.S.C. § 2072 . . . . . 57a
28 U.S.C. § 2073 . . . . . 57a

28 U.S.C. § 2074 (a) 58a
Lanham Act,
15 U.S.C. § 1125(a)(1) 58a
TRCP Rule 56 and FRCP Rule 56
Comparison Chart 59a
TCA § 47-18-104(7), (8) and (27) ... 66a
TCA § 47-18-109(a)(1), (a)(3) and
(e)(1) 67a
TCA § 47-25-101 ..... 67a
TCA § 47-25-104 ..... 68a
TCA § 47-25-105 ..... 68a
TCA § 47-25-106 ..... 69a
OGCA § 10-1-372 ..... 69a
MCA § 75-21-1 ..... 71a
MCA § 75-21-9 ..... 73a
MCA § 75-24-5 ..... 73a
MCA § 75-24-15 ..... 76a
15 U.S.C. § 1121 ..... 77a
Fed. R. Civ. P. 54(a) 78a
Fed. R. Civ. P. 58(b) 78a

App. F: Plaintiff's Response to the Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment, United States District Court Western District of Tennessee Western Division, filed August 18, 2007 ..... 79a

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 07-6470, 08-5325

[Filed December 18, 2009]

MEDISON AMERICA, INC.,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
PREFERRED MEDICAL SYSTEMS, LLC, JERRY K. MCGUIRE, and GREGG REED,	)
	)
Defendants-Appellees.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Before: MOORE and KETHLEDGE, Circuit Judges; and BERTELSMAN, District Judge.*

KETHLEDGE, Circuit Judge. Medison America, Inc. ("Medison") appeals the district court's grant of summary judgment in favor of Preferred Medical Systems, LLC, Jerry K. McGuire, and Gregg Reed (collectively, "Preferred") with respect to Medison's claims under the Lanham Act and the statutory and common law of various states. Medison also appeals several of the district court's discovery orders and its award of costs to Preferred. We affirm.

I.

Medison is a subsidiary of Medison Company Limited, a Korean manufacturer of ultrasound equipment. Medison sells its equipment wholesale to dealers who then resell the equipment to medical providers. Medison competes with General Electric, which manufactures ultrasound equipment that it sells through its own representatives. Preferred Medical Systems, LLC is one such representative; McGuire is its owner, and Reed an employee.

Medison alleges that Preferred told prospective customers that Medison was in bankruptcy and unable to service its ultrasound equipment (the "Medison Story"). According to Medison, Preferred knew the Story was false, and told the Story to prospective customers in Alabama, Georgia, Mississippi, and Tennessee.

---

* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Medison filed this action in federal court, asserting claims under the Lanham Act, 15 U.S.C. § 1125(a)(1), and the trade-disparagement and antitrust statutes of various states. Medison also asserted state common-law claims for fraud, commercial disparagement, conspiracy to injure business, conversion, and tortious interference with business relations.

The parties thereafter engaged in discovery and motion practice. During the course of discovery, Preferred obtained a protective order quashing one of Medison's subpoenas and limiting the scope of two depositions. In addition, shortly before the discovery deadline, Medison moved to depose 17 additional witnesses after the deadline. The district court denied the motion.

At that point—after 22 months of litigation in federal court—Medison filed an essentially identical action in Tennessee state court. Medison then filed a motion in the district court, asking it to abstain from exercising jurisdiction in the case. Medison also moved to amend its complaint in the federal action, to strip out from it the allegations giving rise to federal jurisdiction. The district court denied both motions.

Preferred separately moved for summary judgment. The district court granted that motion. This appeal followed.

II.

A.

Medison challenges the district court's denial of its motion to abstain from exercising jurisdiction over the case. We review that denial for an abuse of discretion. *Great Earth Cos. v. Simons*, 288 F.3d 878, 886 (6th Cir. 2002).

Medison argues that the district court was required to abstain under the rule stated in *Younger v. Harris*, 401 U.S. 37 (1971). That argument is meritless, given that Medison itself brought this case in federal court and then filed essentially the same suit in state court two years later in a brazen attempt to forum-shop.

Medison next argues that the district court should have abstained on prudential grounds. Although federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them[,]" in rare circumstances a district court may decline to exercise jurisdiction in the interest of judicial efficiency. *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817-18 (1976). Here, the district court correctly observed that two considerations—namely, that the federal suit was filed first, and the relative progress of the state and federal cases—favored exercising jurisdiction. No consideration favored abstention. We have no quarrel with those findings. The district court did not abuse its discretion by denying Medison's motion to abstain.

Medison argues that its abstention motion should have been treated as a motion for voluntary dismissal under Federal Rule of Civil Procedure 41(a)(2). For two

reasons, this argument is unavailing. First, no motion was ever made under Rule 41(a)(2), so it would be unfair to fault the district court for not abstaining or dismissing under that rule. Second, the rule states that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Clearly, the district court did not think it proper to relinquish the case so that Medison could prosecute its claims in state court, given how far the litigation had developed.

Medison also appears to argue that the district court lost jurisdiction over the case once Medison filed its motion to amend the complaint. The proposed amendments would have stripped the complaint of its allegations giving rise to federal jurisdiction. Those amendments never took effect, however, because the district court denied leave to make them. *See* Fed. R. Civ. P. 15(a)(2). The district court did not abuse its discretion in doing so, given that the proposed amendments were a transparent attempt to manipulate the court's jurisdiction nearly two years after Medison itself had invoked that jurisdiction. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (citing "bad faith" as a reason to deny leave to amend). We therefore reject this argument as well.

B.

Medison also challenges three of the district court's discovery orders. We review those orders for an abuse of discretion. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996).

Medison argues that the district court wrongly entered a protective order that quashed a subpoena for

one deposition and limited the scope of two others. Medison sought to take these depositions primarily to obtain testimony regarding alleged sexual misconduct completely unconnected with this commercial dispute. The sexual inquiries appeared to have no purpose apart from litigation *in terrorem*; and the district court did not abuse its discretion by prohibiting them. Medison also sought testimony regarding McGuire's resale of used ultrasound equipment, among similar matters, in transactions unrelated to this case. But here too, the district court sought simply to limit discovery to issues relevant to this case. The court did not abuse its discretion in doing so.

On July 9, 2006, the district court entered a joint scheduling order setting the deadline for all depositions as March 30, 2007. On March 13, 2007, Medison moved to enlarge the time for depositions. Judge Vescovo held a telephonic hearing on the motion on March 16, 2007 and denied the motion by written order on March 19, 2007. In that order, however, she permitted the deposition of 17 physicians upon written questions, noticed byMedison for March 30, 2007. Shortly thereafter, Medison canceled those depositions and sought reconsideration of the court's denial of its motion to extend discovery. Following a hearing, the court denied the motion by electronic order written into the docket on July 26, 2007. Medison claims this was error.

Medison's argument proceeds as follows: The 17 witnesses live more than 100 miles from the court and cannot be subpoenaed to appear in court. Their testimony would have to be secured by deposition so that the transcripts could be submitted at trial. In this way, the depositions would be the equivalent of

trial testimony. Because witnesses appearing in person need not be deposed before trial, Medison asserts it had no obligation to depose the 17 witnesses by the discovery deadline.

For three reasons, we find that the district court did not abuse its discretion. First, if Medison intended to depose witnesses for the purpose of memorializing testimony that could be introduced in transcript form as part of its case-in-chief at trial, it could have asked for a separate, later deadline for those depositions to be put into the scheduling order. This is especially true if Medison intended to introduce evidence from those 17 witnesses at the summary-judgment stage. Second, the fact that the district court set March 30, 2007 as the deadline for "all depositions" in its order of March 19th makes it reasonable for the defendants to expect that there would be no further depositions of any kind after that date. Third, Medison offers no evidence that it was prejudiced by not being able to take the depositions. *See In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir. 1996) ("Matters of docket control and conduct of discovery are committed to the sound discretion of the district court. We will not interfere with a trial court's control of its docket except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant") (internal quotation marks omitted).

Finally, Medison argues that the district court's order regulating depositions by written questions misapplied Federal Rule of Civil Procedure 31. Normally, under this rule, the parties serve upon each other, at specified intervals, their respective direct, cross-examination, and redirect questions for the deponent, *see* Fed. R. Civ. P. 31(a); and then they serve

all of the questions upon the deponent in one batch. Here, Medison's announcement of its intention to take such depositions came too late in the discovery period for the parties to exchange their questions before the discovery deadline. So the district court ordered Medison to serve its questions on the deponent first, with Preferred and then Medison serving their cross-examination and redirect questions, respectively, after reviewing the deponent's responses to the preceding questions. We see no abuse of discretion in this process under the circumstances present here. And in the end, Medison never even served its written questions upon the deponent, which prevents it from demonstrating any prejudice. *See generally Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716 (6th Cir. 1999). Medison's argument is meritless.

C.

Medison next challenges the district court's summary-judgment order. "This Court reviews a district court's grant of summary judgment *de novo*." *Moses v. Providence Hosp. & Med. Ctrs., Inc.*, 561 F.3d 573, 578 (6th Cir. 2009). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The evidence cited by the nonmovant must be admissible at trial. *See Alpert v. United States*, 481 F.3d 404, 409 (6th Cir. 2007).

Medison first argues that the district court misallocated the burden of proof for Preferred's motion by requiring Medison to prove that summary judgment was improper. But Medison was required to produce "evidence on which the jury could reasonably find" in its favor as to each element of its claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Here, Preferred "point[ed] out to the district court that there [was] an absence of evidence to support [Medison's] case." *Celotex*, 477 U.S. at 325. In ruling on that ground, the district court did not misallocate any burden with respect to Preferred's motion.

Medison next argues that it produced sufficient evidence to withstand summary judgment on each of its many claims. We turn first to its Lanham-Act claim, which requires proof of "some causal link between the challenged statements and harm to the plaintiff." *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 613 (6th Cir. 1999). Medison had no such proof here. In opposing Preferred's motion, Medison submitted two affidavits, both allegedly from prospective customers who had heard the Medison Story. But one affiant, Dr. Austin, bought Medison's products despite the Story. The other, Dr. Sigman, says only that Preferred's sales pitch—including the Story—caused him not to buy from *Preferred*. Neither of those affidavits, therefore, prove that the Story harmed Medison. Medison now cites its verified complaint as proof, but the complaint offers legal conclusions rather than testimony on this point. *See Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989).

At oral argument, Medison introduced a theory that the Story harmed Medison by forcing it to expend extra money and effort to sell its products. As an initial matter, Medison's opening brief did not clearly articulate this theory, so it was waived. *See Langley v. DaimlerChrysler Corp.*, 502 F.3d 475, 483 (6th Cir. 2007) (concluding that "issues not fully developed and argued were waived") (internal quotation marks omitted). Moreover, the record contains no evidence showing that Medison actually made such expenditures. Consequently, Medison has not created a genuine issue of material fact as to this theory. Summary judgment as to Medison's Lanham-Act claim was therefore proper.

Several of Medison's state-law statutory claims for trade-disparagement likewise require proof of causation. These claims include Medison's claim under Tennessee Code § 47-18-104, *see Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005) (holding that the provision creating a private cause of action under the statute requires proof of causation); its claim under Alabama Code § 8-19-5, *see Billions v. White & Stafford Furniture Co.*, 528 So. 2d 878, 880 (Ala. Civ. App. 1988) (same); and its claim under Georgia Code § 10-1-372, *see Friedlander v. HMS-PEP Prods., Inc.*, 485 S.E.2d 240, 242 (Ga. Ct. App. 1997) (same). Each claim fails for the reasons stated above.

Medison asserts claims under the antitrust statutes of Tennessee, *see* Tenn. Code Ann. § 47-25-101, and Mississippi, *see* Miss. Code Ann. § 75-21-1. In Tennessee, a plaintiff must prove that the defendant entered into an anticompetitive agreement that "affects Tennessee trade or commerce to a substantial degree." *Freeman Indus., LLC v. Eastman Chem. Co.*,

172 S.W.3d 512, 523 (Tenn. 2005). The only effects that Medison cites here are its own alleged injuries, which do not amount to a "substantial" effect on Tennessee trade or commerce as a whole. *See id.* For the Mississippi claim, Medison similarly must show that Preferred monopolized, or attempted to monopolize, a particular market in Mississippi. *See Wicker v. Union County Gen. Hosp.*, 556 So. 2d 297, 300 (Miss. 1989). Medison has produced no evidence of that here. The antitrust claims therefore fail.

A bushel of common-law claims remain. Medison offers no distinctions between the laws of the various states under which it asserts these claims, so we analyze them under general common-law principles. Medison asserts claims for trade disparagement and tortious interference with business relations. Those claims require proof of causation, *see* Restatement (Second) of Torts §§ 623A, 766B, and thus fail for the same reasons its statutory trade-disparagement claims did. Medison also asserts conversion claims, but has produced no evidence that Preferred ever had dominion or control over any of its property. Those claims therefore fail. *See* Restatement (Second) of Torts § 222A(1). Medison's fraud claims require evidence that *Medison* relied upon Preferred's misrepresentations, *see* Restatement (Second) of Torts § 525, but Medison has no such evidence. Hence those claims fail too.

Medison's Tennessee-law claim for civil conspiracy requires proof that Preferred used a "combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means." *See Dale v. Thomas H. Temple Co.*, 20[illegible]S.W.2d 344, 353 (Tenn.

1948). For the reasons already stated, Medison did not produce admissible evidence creating a genuine issue that Preferred acted unlawfully in Tennessee. This claim therefore fails.

That leaves only Medison's claim under Mississippi Code § 75-24-5. Private actions under that statute can be brought only by a "person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property" as a result of the alleged disparagement. Miss. Code Ann. § 75-24-15. Medison is not such a person—it is a business—so this claim fails.

For each of Medison's claims, therefore, it failed to produce admissible evidence creating a genuine issue as to at least one element. Consequently, summary judgment was proper as to all of them.

Finally, Medison contends that the district court improperly awarded the costs of litigation to Preferred. Medison made no effort, however, to develop this argument in its brief. It has therefore waived the issue. *See Langley*, 502 F.3d at 483.

The district court's judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CASE NO: 05-2390-V

[Filed November 19, 2007]

MEDISON AMERICA, INC.	)
	)
PLAINTIFF	)
	)
VS	)
	)
PREFERRED MEDICAL SYSTEMS, LLC.,	)
JERRY K. McGUIRE	)
GREGG REED	)
	)
DEFENDANTS	)
	)

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the Order Granting Defendants' MOTION FOR SUMMARY JUDGMENT, entered on

November 16, 2007, this cause is dismissed with judgment in favor of the defendants.

APPROVED:

s/Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

November 19, 2007
Date

Thomas M. Gould
Clerk of Court

s/Betty Guy
(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

No: 05-2390-V

[Filed November 16, 2007]

MEDISON AMERICA, INC., a California Corporation	)
Plaintiff,	)
v.	)
PREFERRED MEDICAL SYSTEMS, LLC, a Tennessee Limited Liability Company, JERRY K. MCGUIRE, and GREGG REED	)
Defendants.	)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff, Medison America Inc. ("Medison"), filed a complaint on May 26, 2005, against the defendants, Preferred Medical Systems, LLC

("Preferred Medical"), Jerry K. McGuire ("McGuire"), and Gregg Reed ("Reed") (collectively the "Preferred Medical defendants"), alleging that the Preferred Medical defendants made false and disparaging statements about Medison to its potential customers. The complaint also named General Electric ("GE"), Mike Butchko, and Brian Keith (collectively the "GE defendants") as defendants, but the complaint was dismissed with prejudice as against the GE defendants on May 22, 2007. Medison's complaint contains allegations of violations of the federal Lanham Act ("Count One"), common law fraud ("Count Two"), common law trade slander and commercial disparagement ("Count Three"), conspiracy to injure business ("Count Four"), unfair trade practices under the laws of Tennessee ("Count Five"), Georgia ("Count Six"), Alabama ("Count Seven"), and Mississippi ("Count Eight"), restraint of trade in Mississippi ("Count Nine"), personal property conversion ("Count Ten"), and tortious interference with business relations ("Count Eleven").

Specifically, Medison alleges that the Preferred Medical defendants made statements to potential customers that Medison was in bankruptcy, had poor service, was going "out of business," and was "going under." These remarks developed into what was referred to as the "Medison Story." Medison contends that the Preferred Medical defendants told the "Medison Story" to potential customers in an effort to dissuade them from purchasing Medison's products and to encourage them to purchase from Preferred Medical. Now before the court is the Preferred Medical defendants' motion for summary judgment as to all counts. The parties have consented to the jury trial of this matter before the undersigned United

States Magistrate Judge. For the following reasons, the Preferred Medical defendants' motion for summary judgment is GRANTED.

STATEMENT OF UNDISPUTED FACTS

For the purposes of this motion, the court finds that the following facts are undisputed:

1. The plaintiff, Medison, is a California corporation. Medison is owned by Medison Co., Ltd. ("Medison, Ltd."), a Korean company. Medison, Ltd. manufactures ultrasound equipment.

2. Medison sells ultrasound equipment throughout the United States. The ultrasound equipment sold by Medison is manufactured by Medison, Ltd.

3. General Electric Company ("GE"), a New York corporation, manufactures ultrasound equipment.

4. Preferred Medical Systems, LLC ("Preferred Medical") is a Tennessee limited liability company.

5. Preferred Medical is an independent manufacturer's representative for GE in the sale of ultrasound equipment and serves in such capacity in the states of Tennessee, Mississippi, Alabama, Arkansas, Louisiana, and Georgia.

6. There are at least 3,000 potential purchasers of ultrasound equipment in the OB/GYN market within the states of Tennessee, Mississippi, Alabama, Arkansas, Louisiana, and Georgia.

7. GE has at least twenty-three (23) service and support personnel in the states of Tennessee, Mississippi, Alabama, Arkansas, Louisiana, and Georgia to repair and service ultrasound equipment.

8. Medison has only two (2) service and support personnel in the United States, both of whom reside in California.

9. In January 2002, Medison's parent company, Medison, Ltd., entered into a receivership procedure in Korea wherein its primary lender assumed joint control of the company along with Medison, Ltd.'s existing management.

10. In a memorandum to Medison, the Korean legal counsel for Medison, Ltd. stated that the reorganization proceedings in Korea were similar to Chapter 11 bankruptcy proceedings in the United States.

11. The reorganization proceedings were conducted under the Company Reorganization Act of Korea, which states the following as its purpose:

> The purpose of this Act is to coordinate the interest of creditors, stockholders and other interested persons, and to strive for the reorganization and recovery of the business, in respect of any joint stock company (hereinafter in this Act referred to as the "company") which faces imminent bankruptcy due to poor financial circumstances, but which is likely to recover economically.

12. Under the Company Reorganization Act of Korea, a company in the reorganization proceedings may be liquidated in certain circumstances.

13. Medison's own auditors described Medison, Ltd.'s proceedings as a "bankruptcy" in a note to Medison's 2003/2004 Financial Statements.

14. The United States Bankruptcy Court for the Southern District of New York described the proceedings under the Company Reorganization Act of Korea as follows: "The record confirms that Korean bankruptcy law, and in particular the Company Reorganization Act, is substantially similar to United States law." *In re Kyu Byung Hwang*, 309 B.R. 842, 846 (Bankr. S.D.N.Y. 2004).

15. According to its own financial statements, Medison had a multi-million dollar deficit in the year 2003, with liabilities exceeding its assets by $25,845,091, and a multi-million dollar deficit in the year 2004, with liabilities exceeding its assets by $24,671,941.

16. Medison, through its Rule 30(b)(6) corporate representative, Robert DePalma ("DePalma"), confirmed the accuracy of the Medison's financial statements.

17. Medison's complaint alleges that the Preferred Medical defendants made certain disparaging statements to potential purchasers, and Medison's Rule 26 Disclosures list prospective customers that Medison contends did not purchase its product because of the alleged disparaging statements. Together, these documents identify the universe of customers to whom

Medison alleges the Preferred Medical defendants made disparaging statements about Medison and/or its products (hereinafter, the identity of the prospective customers shall be referred to as the "Prospective Customers").

18. None of the Prospective Customers owned Medison equipment prior to the time of the alleged statements.

19. In its response to interrogatories, Medison stated that the information upon which it based the amended complaint came "exclusively from" Mark Patterson ("Patterson"), Mary Margaret Little ("Little"), and Cheryl Martin ("Martin"). Medison added Martin Harris ("Harris") to this list during its deposition.

20. Patterson has an agreement with Bio-Core, Inc. ("BioCore") to assist them in the sale of Medison ultrasound equipment. Patterson's company and BioCore are the exclusive distributors of Medison ultrasound equipment in the states at issue in the Amended Complaint. Patterson testified that the Preferred Medical defendants made disparaging statements to the Prospective Customers. Patterson also testified that he was not present at the time these statements were made, and that all of his information about the allegedly disparaging statements was based upon the out of court statements of third parties.

21. Patterson testified that he did not have any documents containing the allegedly disparaging statements made by the Preferred Medical defendants to any Prospective Customers.

22. Harris is the sole shareholder and an employee of BioCore. Harris testified about allegedly disparaging statements made to some of the Prospective Customers. Harris also admitted that he was not present at the time that the alleged statements were made and that he did not hear the Preferred Medical defendants make the alleged statements.

23. Little is the sister of McGuire and is a former employee of Preferred Medical. Little's employment with Preferred Medical was terminated on or about July 27, 2004.

24. Little could not identify the customers who allegedly heard statements made by Preferred Medical employee Scott Martin or exactly what Mr. Martin said to them.

25. Little could not identify the customers who allegedly heard statements made by Preferred Medical employee Kim Wilson.

26. Little identified one specific customer to whom McGuire allegedly made a statement, but Little testified that she did not actually hear the statement.

27. Little was with a customer, Dr. Scott Smith, and testified that McGuire had allegedly made disparaging statements to the customer through her cell phone. Little was with the customer and McGuire was not. Little did not hear what McGuire was alleged to have said to the customer.

28. Dr. Scott Smith is not listed among the doctors included in Medison's list of Prospective Customers.

29. The only other customer Little mentions in her affidavit is an OB practice in New Albany, MS. Little testified that this customer's decision to purchase a GE product, rather than a Medison, was based upon negative information the customer received from another Medison customer, not on information from the Preferred Medical defendants.

30. Little did not speak to any potential purchasers about their reactions to the alleged statements.

31. Little has never heard defendant Reed make disparaging statements about Medison.

32. Cheryl Martin is a former applications technician who worked for GE and Preferred Medical on a contract basis.

33. Cheryl Martin testified about a single incident involving Medison and a potential purchaser. The incident involved a doctor in Alabama and allegedly occurred in the fall of 2003. At the time, Ms. Martin was not working for Preferred Medical and was in the doctor's office for purely personal reasons. She was accompanying her daughter, who was pregnant, to the doctor's office for her daughter's ultrasound.

34. Medison's corporate representative admitted that Medison has received complaints from its customers.

35. A customer complaint against Medison ripened into a lawsuit against Medison in Alabama in May 2003. The suit alleged, among other things, that Medison "negligently repaired the equipment or

negligently failed to repair the equipment on numerous occasions."

STATEMENT OF DISPUTED FACTS

The parties dispute the following facts:

1. The Preferred Medical defendants argue that they did not make any false or misleading statements of fact concerning Medison or Medison's products or services to the Prospective Customers. Medison contends, however, that the Medison Story contained false, misleading, and disparaging statements and that the testimony of Little and Cheryl Martin fully describes the Medison Story and how and when it was communicated to the Prospective Customers.

2. The Preferred Medical defendants argue that Little testified that while working for Preferred Medical she had made allegedly disparaging statements about Medison, but she could not identify any specific customer to whom such statements were made. Medison disputes this statement, arguing that Little identified the customers to whom she made the disparaging statements as every Prospective Customer of 3D and 4D machines she spoke to that was seeking to purchase Medison products.

3. The Preferred Medical defendants argue that Medison admitted that the Preferred Medical defendants had not exercised dominion and control over any of Medison's property. Medison disputes this statement to the extent that it calls for a conclusion of law.

4. The Preferred Medical defendants argue that Medison admitted that the Preferred Medical defendants had not interfered with any contracts Medison may have had with third parties. Medison disputes this statement to the extent that it calls for a conclusion of law.

ANALYSIS

The critical issue before the court on this motion for summary judgment is whether Medison has sufficient evidence to support the essential elements necessary to make out a case in each of the eleven counts. The Preferred Medical defendants argue that Medison lacks evidence to establish all the essential elements for each count, that much of the evidence Medison does have is inadmissible hearsay, and that the allegedly disparaging statements were not false or misleading. In contrast, Medison argues that it has enough evidence to satisfy the summary judgment hurdle. Medison contends that the statements made by the Preferred Medical defendants were false and misleading. Additionally, Medison claims that the elements of each count in the eleven-count complaint can be established through the affidavits and depositions of its witnesses and that all such necessary evidence is either non-hearsay or falls under an exception to the rule against hearsay.

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction & Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact at issue in the case. *LaPointe*, 8 F.3d at 378. This may be accomplished by pointing out to the court that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

In response, the nonmoving party must go beyond the pleadings and present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 340 (6th Cir. 1993); *see also LaPointe*, 8 F.3d at 378. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986); *LaPointe*, 8 F.3d at 378.

In deciding a motion for summary judgment, "this [c]ourt must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson*, 477 U.S. at 251–52). The evidence, all facts, and any inferences

that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Patton*, 8 F.3d at 346; *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). However, to defeat a motion for summary judgment, "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Anderson*, 477 U.S. at 252; *LaPointe*, 8 F.3d at 378. Finally, a district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *Anderson*, 477 U.S. at 255; *Adams v. Metiva*, 31 F.3d 375, 379 (6th Cir. 1994).

B. Count One – The Lanham Act

Medison claims that by making false and misleading descriptions and representations of fact to the Prospective Customers that Medison was going out of business, in bankruptcy, and unable to provide service or support, the Preferred Medical defendants violated the Lanham Act, which provides as follows:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -
>
> . . . .

> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B) (2007). The Preferred Medical defendants argue that summary judgment should be granted because Medison lacks evidence to support all of the essential elements of its Lanham Act claim.

In order to establish a successful claim for misrepresentation under the Lanham Act, a plaintiff must show that in connection with "commercial advertising or promotion:"

> 1) the defendant has made false or misleading statements of fact concerning his own product or another's; 2) the statement actually or tends to deceive a substantial portion of the intended audience; 3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; 4) the advertisements were introduced into interstate commerce; and 5) there is some causal link between the challenged statements and harm to the plaintiff.

Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 613 (6th Cir. 1999).

1. *False or Misleading Statements of Fact*

In order to maintain an action under the Lanham Act, Medison must show that the Preferred Medical defendants made false or misleading statements of fact about Medison's products. To establish the elements of its Lanham Act claim, Medison relies on the affidavits and deposition testimony of Patterson, Harris, Little, Martin, Dr. Robert Sigman ("Dr. Sigman"), Carl Barton ("Barton"), Myra Therber ("Therber"), and Dr. Joseph Austin ("Dr. Austin"). The Preferred Medical defendants argue that Medison has failed to produce any competent evidence that would satisfy this initial element of a Lanham Act claim. Specifically, the Preferred Medical defendants contend that all of Medison's evidence is either inadmissible hearsay or that it fails to show the alleged statements as being false or misleading.

For a plaintiff to successfully establish the first element in the Lanham Act claim, it must show that the defendants advertisement "is literally false or that it is true yet misleading or confusing." *Am. Council of Certified Podiatric Physicians and Surgeons*, 185 F.3d at 614. If the statements are literally false, no evidence that customers were actually misled is required to establish a violation because the deception is presumed. *Id.* (citations omitted). If the statements are true, yet deceptive, or inherently ambiguous, then proof of actual deception must be produced before a violation can be established. *Id.* A plaintiff relying on statements that are literally true yet misleading must show how customers actually reacted, not just how they could have reacted. *Id.* Lastly, all statements that a Lanham Act claim is based upon must be ones of fact, not of opinion. *Id.*

It is important to note that hearsay may not be considered on a motion for summary judgment. *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 927 (6th Cir. 1999). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

a. Patterson's Testimony

During his deposition, Patterson testified about disparaging statements that were allegedly made to the Prospective Customers. Patterson admitted, however, that he was not present when the statements were made, and that all of his information about the allegedly disparaging statements was obtained from third parties. He also testified that he did not have any documents that contained the allegedly disparaging statements made to any Prospective Customers by the Preferred Medical defendants.

Testimony directly from any of the Prospective Customers stating the Preferred Medical defendants made allegedly disparaging statements would be admissible because it could be offered to prove that the Preferred Medical defendants made the allegedly disparaging statements rather than to show that the information asserted in the alleged statements was actually true, and thus, such testimony would not constitute hearsay. Patterson, however, was not a Prospective Customer. Patterson was testifying about his conversations with Prospective Customers and offering the statements made to him by the Prospective Customers for their truth, that is, that the Preferred Medical defendants made allegedly

disparaging statements to the Prospective Customers. This testimony from Patterson represents a first level of hearsay that does not fall under any exception. *See* FED. R. EVID. 801(c), 802-03. The Seventh Circuit used this analysis when it excluded as hearsay the testimony given by individuals regarding conversations they had with third parties about alleged disparaging statements. *See Bularz v. Prudential Ins. Co. of Am.*, 93 F.3d 372, 377-78 (7th Cir. 1996). Because the testimony of Patterson is hearsay, it may not be considered on summary judgment. *Jacklyn*, 176 F.3d at 927.

b. Harris' Testimony

Harris also testified at his deposition about allegedly disparaging statements made to some of the Prospective Customers. Harris, however, admitted that he was not present at the time the alleged statements were made and that he did not hear the Preferred Medical defendants make any of the alleged statements. Using the same analysis applied to Patterson's affidavit, the testimony of Harris is also hearsay. Harris is only testifying about information that was retold to him by Prospective Customers. As such, Harris' testimony may not be considered on a motion for summary judgment.

c. Little's Affidavit and Deposition Testimony

Little is a former employee of Preferred Medical who testified that she herself made disparaging statements about Medison to some of the Prospective Customers while she was employed by Preferred Medical. She was unable, however, to specifically identify any of these Prospective Customers by name,

stating only that she made the disparaging statements, by telling the Medison Story, to every 3D or 4D customer who mentioned Medison.

In order to satisfy the first element of a Lanham Act claim, the Medison Story, as told by Little, must be shown to be false or misleading. Part of the Medison Story included comments by Little that Medison was bankrupt, on the brink of bankruptcy, or in bankruptcy proceedings. These comments were indeed substantiated by the fact that Medison, Ltd. had entered into a receivership in Korea under the Company Reorganization Act of Korea. Korean legal counsel for Medison, Ltd. stated that the receivership was similar to Chapter 11 bankruptcy proceedings in the United States. Additionally, Medison's own auditors described Medison, Ltd.'s proceedings as a bankruptcy. Other courts have also found the Company Reorganization Act of Korea to be substantially similar to United States Chapter 11 bankruptcy law. *See In re Kyu-Byung Hwang*, 309 B.R. 842, 846 (Bankr. S.D.N.Y. 2004). When taken as a whole, this evidence shows that it is not literally false to say that Medison, Ltd.'s Korean proceedings involve bankruptcy.

Because Medison, Ltd. and Medison share the same business name, it is therefore not literally false to say that "Medison" is involved in bankruptcy proceedings, or to use other variations of the term bankruptcy in relation to Medison. Furthermore, it cannot be considered true yet misleading to refer to Medison, Medison, Ltd., or both as being involved in bankruptcy. Medison, Ltd. wholly owned Medison and manufactured all the equipment that Medison sold. Any negative implications of bankruptcy on Medison,

Ltd., such as drastic reorganization or even a closure of business, would have severe repercussions on Medison and its ability to do business. As a result, the statements Little made involving Medison's bankruptcy cannot be considered false and misleading because they are neither literally false nor true yet deceptive. Even if the statements were found to be true yet deceptive, Little provides no testimony that shows how any Prospective Customers actually reacted to the statements, which would prohibit the statements from satisfying the false or misleading element under applicable law. *See Am. Council of Certified Podiatric Physicians and Surgeons*, 185 F.3d at 614.

Little also testified that she made statements, as part of the Medison Story, that Medison was financially unstable. It is undisputed that Medison had multi-million dollar deficits in both 2003 and 2004, with liabilities exceeding its assets by more than $24 million each year. As a California corporation, Medison was insolvent under California law because its debts were greater than all of its assets. *See* Cal. Civ. Code § 3439.02(a) (West 2007).[1] Little's statements about Medison's financial instability are certainly consistent with the facts, and thus, not false or misleading. Furthermore, Little's statements can also be construed as opinions, which are not actionable under the Lanham Act. *Am. Council of Certified Podiatric Physicians and Surgeons*, 185 F.3d at 614.

---

[1] Cal. Civ. Code § 3439.02(a) (West 2007) provides: "A debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all the debtor's assets."

Another part of the Medison Story, as testified to by Little, included comments that Medison was going out of business. This statement is also an opinion, which is non-actionable under the Lanham Act. *Id.* Lanham Act claims must be based on false or misleading statements of facts, and as the court in *Fieldturf* put it, statements of fact are "specific and measurable claim[s], capable of being proved false," or, in other words, capable of being "adjudged true or false through empirical verification." *Fieldturf, Inc. v. Southwest Recreational Indus., Inc.*, 235 F. Supp. 2d 708, 725 (E.D. Ky. 2002)(holding that competitor's statements regarding artificial turf manufacturer's systems were not actionable under Lanham Act); *See also Moulton v. VC3*, No. 1:00CV434-TWT, 2000 WL 33310901, *3 (N.D. Ga. 2000) (stating that statements as to which reasonable people might differ and which cannot be proved true or false are not actionable). The Medison Story, as testified to by Little, stated that Medison was going out of business. When taken in context with the bankruptcy proceedings and financial instability, this statement is a mere prediction or opinion about the future of Medison, and consequently, is not actionable as a false or misleading statement of fact under the Lanham Act.

Lastly, Little testified that the Medison Story contained statements that Medison did not support or had problems servicing ultrasound equipment. When these statements are compared to the record, neither is literally false. Medison only employed two service agents, both of whom resided in California. Service for the equipment that might have been purchased by the Prospective Customers was the responsibility of the local dealer and not Medison. The claim, however, that Medison does not support its equipment seems to

be true yet deceptive. Telling a Prospective Customer that Medison does not support its equipment, while technically true, may lead the customer to believe that no support is available, when in fact, all the Prospective Customer would have to do is contact the independent dealer that sold them the Medison product. This being stated, Little failed, however, to provide any testimony as to how any Prospective Customers actually were deceived by or reacted to the claim that Medison did not provide support. Therefore, the statement does not satisfy the first element of a Lanham Act claim.

Similarly, the part of the Medison Story that Little testified to as containing statements that Medison had problems servicing ultrasound equipment is also not a false or misleading statement of fact. Medison, as admitted by its corporate representative, did have complaints against it that related to its service of equipment, one of which ripened into a lawsuit. *See George V. Seir, DVM v. Medison America, Inc.*, No. 02-087-B (Cir. Ct. Autauga County, Ala.). Therefore, stating that Medison had problems servicing equipment is not literally false. It is, however, true yet deceptive. The statement, when given in the context of the Medison Story, could deceive Prospective Customers into believing that Medison's service was substandard and inadequate, and that Medison had problems servicing all its equipment. Little, however, failed to provide any testimony that any Prospective Customers were actually deceived by this statement. As a result, the statement does not rise to the level of a false and misleading statement for purposes of the Lanham Act.

The rest of Little's affidavit contains testimony that she heard others making disparaging statements in the form of the Medison Story to Prospective Customers. In order to survive summary judgment, Medison has to identify to whom the Preferred Medical defendants told the Medison Story, and bare allegations that the Medison Story was told to unidentified third parites is insufficient. *See Morgan v. New York Life Ins. Co.*, No. 1:05cv2872, 2006 WL 2524237, *6 (N.D. Ohio 2006). Little testified that she heard Scott Martin and Kim Wilson tell the Medison Story to Prospective Customers. Little failed, however, to identify any of the people that Scott Martin or Kim Wilson were speaking to when she heard them telling the Medison Story. As a result, Little's testimony regarding Mr. Martin's and Ms. Wilson's statements cannot establish that the Preferred Medical defendants made a false or misleading statement of fact.

One of the individual customers that Little was able to identify by name was Dr. Sigman, in Alabama, who allegedly was told the statements in the Medison Story by McGuire. Little, nonetheless, was not present at the time McGuire allegedly told the Medison Story to Dr. Sigman. Little testified that McGuire told her that he had told the Medison Story to Dr. Sigman. Assuming that this testimony is admissible non-hearsay, the Medison Story, as described by Little and analyzed above, still does not contain the necessary statements of false or misleading facts, coupled with corroborating testimony about their effect on Dr. Sigman, to satisfy the first element of a Lanham Act claim. Additionally, there is no testimony to suggest that any version of the Medison Story told by McGuire would contain additional statements that

might rise to the level required to satisfy the first element of the Lanham Act.

Little also identified Dr. Scott Smith as a person who had been told the Medison Story. In this instance, McGuire allegedly told Dr. Smith the Medison Story over Little's cell phone. Little was present with Dr. Smith while McGuire spoke with him over the phone. Little could not hear what McGuire told Dr. Smith, and she provided no testimony indicating that McGuire told her what he had told Dr. Smith. This testimony is insufficient to establish an issue of material fact as to whether McGuire made false or misleading statements of fact to Dr. Smith for purposes of a Lanham Act claim.

In summary, Little's affidavit and deposition testimony is insufficient to establish that the Preferred Medical defendants made any false or misleading statements of fact that satisfy the necessary criteria to be actionable under the first element of the Lanham Act.

d. Cheryl Martin's Affidavit

Martin testified about one specific time when she made a statement to a Prospective Customer about Medison being in bankruptcy. As discussed previously, the statement that Medison was in bankruptcy cannot be considered false or misleading. Furthermore, Cheryl Martin was not working for Preferred Medical at the time she made the statement; she was only in the Prospective Customer's office for personal reasons. Because she was not acting in the scope of employment for Preferred Medical, no statements she made could rightly be attributed to the

Preferred Medical defendants for purposes of a Lanham Act claim. *See Parker v. General Extrusions, Inc.*, 491 F.3d 596, 602 (6th Cir. 2007) (stating that an employer is liable only when an employee was acting in the scope of employment). Thus, Cheryl Martin's affidavit fails to provide any evidence of a false or misleading statement of fact that was made to any Prospective Customer by the Preferred Medical defendants.

c. Dr. Sigman's Affidavit

Dr. Sigman, a Prospective Customer, testified that McGuire told him that Medison was financially unstable and bankrupt. As discussed above, neither statement is literally false when applied to Medison. The question then becomes whether the statements were true yet deceptive. Dr. Sigman testified that McGuire's statements gave him the impression that Medison "was or was on the verge of going out of business." This statement is not indicative of deception because the financial numbers for Medison, as previously discussed, suggested strong instability in the company, and thus, Dr. Sigman's impression does not indicate that he was actually deceived by McGuire's statements.

Dr. Sigman also testified that McGuire told him Medison could not provide service or maintenance and repair on its equipment. While technically true, as discussed above, there is no evidence that Dr. Sigman was actually deceived by the statements. Dr. Sigman testified that it was Medison's and Preferred Medical's emphasis on each other, instead of the products, that turned him away from purchasing from either. In no way does this testimony suggest that Dr. Sigman was

actually deceived by any statements from the Preferred Medical defendants. If anything, Dr. Sigman's testimony suggests that he was frustrated with the situation and decided to purchase from another company, whether he believed McGuire or not.

f. Barton's Affidavit

Barton testified to one particular instance of disparaging statements related to her by Joanne Pippin, a person who worked for a Prospective Customer. Barton testified that McGuire made statements about Medison's bankruptcy to Pippin during a demonstration. As discussed above in the section on Patterson's testimony, Barton's testimony about what McGuire told Pippin is hearsay and cannot be considered for summary judgment.

g. Therber's Affidavit

Therber testified that McGuire made disparaging statements to Dr. Drucker in Dalton, Georgia. Therber states that McGuire told Dr. Drucker that Medison was having bankruptcy problems. The affidavit does not state the basis for Therber's knowledge. It is impossible to tell from her testimony if she was present when the statements were made or received the information from a third party. Because Therber did not work with McGuire, the context does not suggest that she would have been present when the statements were allegedly made. This creates a high likelihood that her testimony is based on inadmissible hearsay. The Eighth Circuit found that when the context and content of an affiant's testimony does not support an inference that it is based upon personal knowledge, that testimony may be properly

ignored. *See Brooks v. Tri-Systems, Inc.*, 425 F.3d 1109, 1111-12 (8th Cir. 2005). As a result, Therber's testimony fails to establish the existence of any false or misleading statement of fact.

h. Austin's Affidavit

Dr. Austin, a Prospective Customer, testified that McGuire made statements to him about Medison being in shaky financial condition and having trouble servicing its products. As previously discussed, these statements were not literally false. Therefore, in order to be actionable, the statements must be true yet deceptive. Dr. Austin provides no evidence to suggest that he was actually deceived by the statements. In fact, Dr. Austin's testimony suggests that he was not deceived because he purchased a Medison product despite the statements made by McGuire. As a result, Dr. Austin's testimony provides no evidence that actionable false or misleading statements were made for purposes of a Lanham Act claim.

i. Summary

After analyzing the proof, undisputed facts, and affidavits in this case, this court finds that Medison has not presented sufficient evidence to create a material issue of fact as to whether false statements of fact were made by the Preferred Medical defendants or whether any other statements of fact actually deceived any of the Prospective Customers. Consequently, the first element of the Lanham Act claim is not satisfied.

2. Materiality of Statements

In order to prevail on a claim under the Lanham Act, Medison must be able to show that "the statement is material in that it will likely influence the deceived consumer's purchasing decisions." *Am. Council of Certified Podiatric Physicians and Surgeons*, 185 F.3d at 613. Even if the statements are literally false, the plaintiff must still establish materiality. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1250 (11th Cir. 2002). The determination of materiality should take into account the relevant consumer market, and it should be assessed from the relevant consumer perspective. *See Fed. Express Corp. v. U.S. Postal Serv.*, 40 F. Supp. 2d 943, 953 (W.D. Tenn. 1999). Other courts have held this element to require proof that a potential customer would have bought the plaintiff's product had it not been for the false or misleading statements of the defendant. *See IQ Products Co. v. Penzoil Products Co.*, 305 F.3d 368, 375 (5th Cir. 2002).

In this case, Medison has presented no evidence that the purchasing decisions of the Prospective Customers were influenced by any false or misleading statements from the Preferred Medical defendants. Little did not speak to any of the Prospective Customers about their reactions to the allegedly false and misleading statements that she made. Martin, Barton, and Therber provide no concrete evidence that Prospective Customers' purchasing decisions were effected by statements from the Preferred Medical defendants. Indeed, Dr. Sigman and Dr. Austin, the only two Prospective Customers who testified, provide no evidence or statements that their purchasing decisions were influenced by false statements from the

Preferred Medical defendants. Dr. Sigman did not testify that he would have purchased a Medison product had it not been for the deceptive statements of the Preferred Medical defendants, and Dr. Austin actually purchased a Medison product, proving any statements did not influence him.

In summary, Medison has not provided any evidence that creates a material issue of fact regarding the materiality of any false or misleading statements. Neither Dr. Sigman nor Dr. Austin were deceived by the statements made by McGuire, and as a result, their purchasing decisions could not likely have been materially influenced as required for a Lanham Act claim. The rest of Medison's witnesses provide no testimony that can prove any false or misleading statements were made by the Preferred Medical defendants, or that any of those statements materially influenced the purchasing decisions of any of the Prospective Customers. As a result, Medison has not satisfied this element of making out a prima facie case under the Lanham Act.

3. Other Elements

Because Medison has failed to provide sufficient evidence to establish that the Preferred Medical defendants made any false or misleading statements of fact or that any statements actually deceived a Prospective Customer and influenced a purchasing decision, this court need not address the other required elements to make out a claim under the Lanham Act.

4. Summary

Medison has failed to provide sufficient evidence to establish two of the five elements required for a Lanham Act claim. Accordingly, the Preferred Medical defendants' motion for summary judgment as to Count One is GRANTED.

C. Count Two - Common Law Fraud

Medison claims that the Preferred Medical defendants have committed common law fraud against it. Medison alleges that the Preferred Medical defendants took, by deceit, rights and entitlements of value to Medison and other corporeal and incorporeal property of Medison. The Preferred Medical defendants argue that Medison lacks sufficient evidence to support all of the essential elements of its common law fraud claim.

In order to sustain an action "for fraudulent misrepresentation, the plaintiff must show that: 1) the defendant made a representation of an existing or past fact; 2) the representation was false when made; 3) the representation was in regard to a material fact; 4) the false representation was made either knowingly or without belief in its truth or recklessly; 5) plaintiff reasonably relied on the misrepresented material fact; and 6) plaintiff suffered damage as a result of the misrepresentation." *Ingram v. Cendant Mobility Fin. Corp.*, 215 S.W.3d 367, 371 (Tenn. Ct. App. 2006). If a non-moving party who bears the burden of proof "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment must be entered against that

party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

In this case, Medison provides no evidence to show that it "reasonably relied on the misrepresented material fact." In fact, Medison does not even allege that it relied on any representations of material facts. The amended complaint only alleges that false statements were made to the Prospective Customers, not to Medison. Accordingly, because Medison has failed to provide any evidence to establish one of the essential elements of its claims, the Preferred Medical defendants' motion for summary judgment as to Count Two is GRANTED.

D. Count Three - Common Law Trade Slander and Commercial Disparagement

Medison claims that the Preferred Medical defendants have committed common law trade slander and commercial disparagement against it. Medison alleges that the Preferred Medical defendants made false and misleading statements that defamed the business reputation of Medison in the marketplace. The Preferred Medical defendants argue that Medison lacks evidence to support all of the essential elements of its claims.

Under the common law of Tennessee, there are no causes of action entitled "Trade Slander" or "Commercial Disparagement." This court must assume, as did the Preferred Medical defendants, that Medison is referring only to a general defamation action involving slander, or spoken defamation. Medison does not argue to the contrary in its reply briefs. In order to sustain a cause of action for

defamation in Tennessee, the plaintiff must show that "1) a party published [by communicating to a third person] a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." *Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999).

As previously discussed under Count One, Medison lacks evidence to support allegations that the Preferred Medical defendants made false statements to third parties. Furthermore, the record is entirely silent as to any evidence that the Preferred Medical defendants either knew the statements to be false or were reckless or negligent in failing to ascertain whether the statements were false. When, as is the case here, statements "convey true concepts and/or opinions of the publishers supported by true facts," the defamation action will fail. *Wagner v. Fleming*, 139 S.W.3d 295, 303 (Tenn. Ct. App. 2004). Accordingly, because Medison lacks evidence to establish the essential elements of its claims, the Preferred Medical defendants' motion for summary judgement as to Count Three is GRANTED.

E. Count Four - Conspiracy to Injure Business

Medison claims that the Preferred Medical defendants have engaged in conspiracy to injure business. Medison alleges that the Preferred Medical defendants conspired to injure Medison's business by using unfair competition and disparagement. The Preferred Medical defendants argue that no such cause of action exists in Tennessee, and that the most analogous cause of action is civil conspiracy. Medison

does not argue to the contrary in its reply briefs. This court will assume that Count Four is a civil conspiracy cause of action.

A civil conspiracy is a "combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means." *Dale v. Thomas H. Temple Co.*, 208 S.W.2d 344, 353 (Tenn. 1948). As previously discussed, Medison lacks evidence to prove that the Preferred Medical defendants have engaged in any unlawful conduct that harmed Medison. Accordingly, the Preferred Medical defendants' motion for summary judgment as to Count Four is GRANTED.

F. Count Five - Unfair Trade Practices in Tennessee

Medison claims that the Preferred Medical defendants engaged in unfair trade practices in violation of TENN. CODE ANN. §§ 47-25-101, 47-18-104(b)(8). Medison alleges that the Preferred Medical defendants, through disparaging statements, engaged in deceptive acts and practices that proximately caused injury to Medison and lessened full and free competition. The Preferred Medical defendants argue that Medison lacks evidence to prove the essential elements of these claims.

The first part of Count Five is Medison's assertion that the Preferred Medical defendants violated the Tennessee Trade Practices Act ("TTPA"), which provides:

> All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or

> which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.

TENN. CODE ANN. § 47-25-101 (2007). This statute is not one normally asserted in cases involving disparagement, defamation, or slander. In order to determine whether the TTPA applies to the given facts, the focus is "not on the anticompetitive conduct itself, but on the *effects* of the conduct on Tennessee commerce." *Freeman Indus., LLC v. Eastman Chemical Co.*, 172 S.W.3d 512, 524 (Tenn. 2005). Bare allegations that prices were raised as a result of conduct is insufficient to establish that Tennessee commerce was substantially affected. *Id.*

As previously discussed under the Lanham Act claim, Medison has provided no evidence that the Preferred Medical defendants have engaged in any type of anti-competitive conduct that raised prices and injured Medison. Medison cannot prove that the Preferred Medical defendants were part of any arrangement, contract, agreement, trust, or combination that caused Medison injury. In fact, as discussed previously, Medison has no evidence to prove any injuries at all. Consequently, Medison fails to provide evidence to sustain a cause of action under the TTPA.

Medison also makes a claim under the Tennessee Consumer Protection Act ("TCPA"), which prohibits "[d]isparaging the goods, services or business of another by false or misleading representations of fact. TENN. CODE ANN. § 47-18-104(b)(8) (2007). This cause of action is Tennessee's state law equivalent of a Lanham Act claim. For the reasons previously discussed under Count One, Medison fails to provide sufficient evidence to create an issue of material fact regarding this state law claim.

Accordingly, the Preferred Medical defendants' motion for summary judgment as to Count Five is GRANTED.

G. Count Six - Unfair and Deceptive Trade Practices in Georgia

Medison claims that the Preferred Medical defendants engaged in unfair and deceptive trade practices in violation of GA. CODE ANN. § 10-1-372(a)(8) (2007). The statute prohibits engaging in deceptive trade practices by disparaging the goods, services, or business of another through false or misleading representations of fact. *See* GA. CODE ANN. § 10-1-372(a)(8) (2007).

This cause of action is Georgia's state law equivalent of a Lanham Act claim. For the reasons previously discussed under Count One, Medison fails to provide sufficient evidence to create an issue of material fact regarding this state law claim. Accordingly, the Preferred Medical defendants' motion for summary judgment as to Count Six is GRANTED.

H. Count Seven - Unfair and Deceptive Trade Practices in Alabama

Medison claims that the Preferred Medical defendants engaged in unfair and deceptive trade practices in violation of ALA. CODE § 8-19-5(8) (2007). The statute prohibits engaging in deceptive trade practices by disparaging the goods, services, or business of another through false or misleading representations of fact. *See* ALA. CODE § 8-19-5(8) (2007).

This cause of action is Alabama's state law equivalent of a Lanham Act claim. For the reasons previously discussed under Count One, Medison fails to provide sufficient evidence to create an issue of material fact regarding this state law claim. Accordingly, the Preferred Medical defendants' motion for summary judgment as to Count Seven is GRANTED.

I. Count Eight - Unfair and Deceptive Trade Practices in Mississippi

Medison claims that the Preferred Medical defendants engaged in unfair and deceptive trade practices in violation of MISS. CODE ANN. § 75-24-5(2)(h) (2007). The statute prohibits engaging in deceptive trade practices by disparaging the goods, services, or business of another through false or misleading representations of fact. *See* MISS. CODE ANN. § 75-24-5(2)(h) (2007).

This cause of action is Mississippi's state law equivalent of a Lanham Act claim. For the reasons previously discussed under Count One, Medison fails

to provide sufficient evidence to create an issue of material fact regarding this state law claim. Accordingly, the Preferred Medical defendants' motion for summary judgment as to Count Eight is GRANTED.

J. Count Nine - Restraint of Trade in Mississippi

Medison claims that the Preferred Medical defendants alleged disparagement violated Mississippi's state anti-trust provision. The statute provides protection against "a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any one or more of either with one or more of the others" when the effect of the agreement would be "inimical to the public welfare" and would "restrain trade." MISS. CODE ANN. § 75-15-1(a) (2007). In order to maintain a cause of action under this statute, courts have required plaintiffs to show that the alleged conduct is in some way hostile to the public welfare. *See Hardy Bros. Body Shop, Inc. v. State Farm Mutual Auto. Ins. Co.*, 848 F. Supp. 1276, 1290 (S.D. Miss. 1994).

Here, as previously discussed under Count Five, Medison has made no showings that there was any contract or agreement that resulted in the restraint of trade. Furthermore, Medison has failed to provide any evidence as to how the Preferred Medical defendants alleged actions were hostile to the public welfare. This is not an anti-trust case and conclusory allegations, without further evidence, that the Preferred Medical defendants lessened competition by disparaging Medison cannot convert it into one. Accordingly, the

Preferred Medical defendants' motion for summary judgment as to Count Nine is GRANTED.

K. Count Ten - Common Law Personal Property Conversion

Medison claims that the Preferred Medical defendants used disparagement to convert personal property of Medison and exercised control over the property with no intent to return it. The Preferred Medical defendants argue that Medison lacks any evidence to establish its conversion claim. Conversion is "the appropriation of the thing to the party's own use and benefit, by the exercise of dominion over it, in defiance of plaintiff's right." *River Park Hosp., Inc. v. BlueCross BlueShield of Tenn., Inc.*, 173 S.W.3d 43, 60 (Tenn. Ct. App. 2002) (citations omitted).

In this case, Medison has failed to provide any evidence that the Preferred Medical defendants are exercising control over any of Medison's property. Furthermore, Medison's designated corporate representative admitted that the Preferred Medical defendants had no property that belongs to Medison. Medison only argues that the Preferred Medical defendants' disparagement has exercised control over intangible or inchoate rights. These rights are not tangible property. There is no authority for a claim of conversion of intangible property. *B & L Corp. v. Thomas*, No. 01-A-01-9506-CH00274, 1996 WL 518079, *4 (Tenn. Ct. App. 1996). Accordingly, the Preferred Medical defendants' motion for summary judgment as to Count Ten is GRANTED.

L. Count Eleven - Common Law Tortious Interference with Business Relations

Medison claims that it has an inviolable right to cultivate and maintain business relations with potential and existing customers and that the Preferred Medical defendants tortiously interfered with that right when they disparaged Medison. The Preferred Medical defendants argue that Medison has failed to present any competent evidence to support the necessary elements of its claim.

In order to establish a claim for tortious interference with business relations, a plaintiff must show:

> (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means; and finally, (5) damages resulting from the tortious interference.

Trau-Med of America, Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 701 (Tenn. 2002) (citations and footnotes omitted). When seeking to show improper motive, a plaintiff must "demonstrate that the defendant's predominant purpose was to injure the plaintiff." *Id.* n.5.

As previously discussed under Count One, Medison has failed to provide any competent evidence that the Preferred Medical defendants interfered with any of Medison's business relationships. Medison's corporate representative stated that the Preferred Medical defendants had not interfered with any third party contracts of Medison's. Additionally, Medison has presented no evidence that the Preferred Medical defendants acted with improper motives or used improper means as required by the case law, and Medison has shown no evidence that the Preferred Medical defendants intended to cause breach or termination of any applicable business relationship. Accordingly, the Preferred Medical defendants' motion for summary judgment as to Count Eleven is GRANTED.

CONCLUSION

For the reasons stated above, this court finds that Medison has failed to show that there are genuine issues of material fact at issue in this case and finds that the Preferred Medical defendants are entitled to a judgment as a matter of law on each of the eleven counts. Accordingly, the Preferred Medical Defendant's motion for summary judgment is granted as to all counts.

IT IS SO ORDERED this 16th day of November, 2007.

s/ Diane K. Vescovo
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 07-6470/08-5325

[Filed February 9, 2010]

MEDISON AMERICA, INC.,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
PREFERRED MEDICAL SYSTEMS, LLC, ET AL.,	)
	)
Defendants-Appellees.	)
	)

ORDER

BEFORE: MOORE and KETHLEDGE, Circuit Judges; and BERTELSMAN,* District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of

* Hon. William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX E

Constitutional Provisions/Treaties/Statutes involved in this case

United States Constitution, 5th Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, 10th Amendment

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Article VI

> All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States

under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332(a)(1):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between—

(1) Citizens of different States;

Rules Enabling Act, 28 U.S.C. § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts....

(b) Such rules shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2073

(a)(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and the professional bar, trial and appellate judges.

(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by committee appointed under subsection (a)(2) of this section

may be necessary to maintain consistency and otherwise promote the interest of justice.

(c)(1) Each meeting for the transaction of business under this chapter by any committee...shall be open to the public, except....

(d) In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate issues.

28 U.S.C. § 2074(a)

The Supreme Court shall transmit to the Congress not later than May 1 of the year in which the rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.

Lanham Act, 15 U.S.C. § 1125(a)(1):

(a) Civil action.

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

TRCP Rule 56 and
FRCP Rule 56 Comparison Chart

TENNESSEE RULE 56	FEDERAL RULE 56
Rule 56.01. For Claimant A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of **thirty (30)** days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favour upon all or any part thereof.	**Rule 56(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of **20** days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favour upon all or any part thereof.

Rule 56.02. For Defending Party A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.	**Rule 56(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits, for summary judgment in the party's favor as to all or any part thereof.
Rule 56.03. Specifying Material Facts In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record. Any party opposing the motion for summary judgment must, not later than five days before the	[NO FEDERAL RULE EQUIVALENT]

hearing, serve and file a response to each fact set forth by the movant either (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment only, or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record. Such response shall be filed with the papers in opposition to the motion for summary judgment. In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends there exists a genuine issue to be tired. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute. If the non-moving party has asserted additional facts, the moving party shall be allowed to respond to these additional facts by filing a reply statement in the same	

manner and form as specified above.	
Rule 56.04. Motion and Proceedings Thereon The motion shall be served at least **thirty (30)** days before the time fixed for the hearing. The adverse party may serve **and file** opposing affidavits **not later than five days before the hearing. Subject to the moving party's compliance with Rule 56.03,** the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. **The trial court shall state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling.** A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine	**Rule 56(c) Motion and Proceedings Thereon.** The motion shall be served at least **10** days before the time fixed for the hearing. The adverse party **prior to the day of hearing** may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

issue as to the amount of damages.	
Rule 56.05. Case Not Fully Adjudicated on Motion If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.	**Rule 56(d) Case Not Fully Adjudicated on the Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shale be conducted accordingly.

Rule 56.06. Form of Affidavits; Further Testimony; Defense Required	**Rule 56(e) Form of Affidavits; Further Testimony; Defense Required.**
Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but **his or her** response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if	Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, **but the adverse party's** response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary

appropriate, shall be entered against the adverse party. **Expert opinion affidavits shall be governed by Tennessee Rule of Evidence 703.**	judgment, if appropriate, shall be entered against the adverse party.
Rule 56.07. When Affidavits Are Unavailable Should it appear from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.	**Rule 56(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify the **party's** opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.
Rule 56.08. Affidavits Made in Bad Faith Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party	**Rule 56(g) Affidavit Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party

employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees and any offending party or attorney may be adjudged guilty of contempt.	employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees and any offending party or attorney may be adjudged guilty of contempt.

Tenn. Code Ann. § 47-18-104 (2009). Unfair or deceptive acts or practices.

(a) Unfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices and are Class B misdemeanors.

(b) Without limiting the scope of subsection (a), the following unfair or deceptive acts or practices affecting the conduct of any trade or commerce are declared to be unlawful and in violation of this part:

* * *

(7) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(8) Disparaging the goods, services or business of another by false or misleading representations of fact;

* * *

(27) Engaging in any other act or practice which is deceptive to the consumer or to any other person;

* * *

Tenn. Code Ann. § 47-18-109 (2009). Private right of action -- Damages -- Notice to division.

(a)(1) Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.

* * *

(3) If the court finds that the use or employment of the unfair or deceptive act or practice was a willful or knowing violation of this part, the court may award three (3) times the actual damages sustained and may provide such other relief as it considers necessary and proper.

* * *

(e)(1) Upon a finding by the court that a provision of this part has been violated, the court may award to the person bringing such action reasonable attorney's fees and costs.

Tenn. Code. Ann. § 47-25-101 (2009). Trusts, etc., lessening competition or controlling prices unlawful and void.

All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and

free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.

Tenn. Code. Ann. § 47-25-104 (2009). Charter forfeiture, or exclusion of foreign corporations, for violations.

(a) Any corporation chartered under the laws of the state which violates any of the provisions of either § 47-25-101 or § 47-25-102 shall thereby forfeit its charter and its franchise, and its corporate existence shall thereupon cease.

(b) Every foreign corporation which commits such a violation is denied the right to do, and is prohibited from doing, business in this state.

(c) It is the duty of the attorney general and reporter to enforce these provisions.

Tenn. Code Ann. § 47-25-105 (2009). Liability for debts of trust, etc.

All persons and corporations, and the officers and the stockholders of all corporations, that become or continue to be members of, or in any way connected with or concerned in, any such trust, contract, agreement, or combination, shall be jointly and

severally liable to pay all the debts, obligations, and liabilities of each and every person and corporation that become or continue to be a member thereof, connected therewith, or concerned therein, as fully as if all were partners in the creation of such debts, obligations, and liabilities.

Tenn. Code Ann. § 47-25-106 (2009). Recovery of consideration as remedy for damages.

Any person who is injured or damaged by any such arrangement, contract, agreement, trust, or combination described in this part may sue for and recover, in any court of competent jurisdiction, from any person operating such trust or combination, the full consideration or sum paid by the person for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust.

O.C.G.A. § 10-1-372 (2009). When trade practices are deceptive; common-law and other remedies unaffected

(a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

(1) Passes off goods or services as those of another;

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;

(4) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) Represents that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;

(8) Disparages the goods, services, or business of another by false or misleading representation of fact;

(9) Advertises goods or services with intent not to sell them as advertised;

(10) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

(b) In order to prevail in an action under this part, a complainant need not prove competition between the parties or actual confusion or misunderstanding.

(c) This Code section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this state.

Miss. Code Ann. § 75-21-1 (2008). Trust and combine; defined

A trust or combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be:

(a) To restrain trade;

(b) To limit, increase or reduce the price of a commodity;

(c) To limit, increase or reduce the production or output of a commodity;

(d) To hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(e) To engross or forestall a commodity;

(f) To issue, own or hold the certificate of stock of any trust and combine within the spirit of this chapter knowing it to be such at the time of the issue or the acquisition or holding such certificate; or

(g) To place the control to any extent of business or of the proceeds or earnings thereof, contrary to the spirit and meaning of this chapter, in the power of trustees, by whatever name called; or

(h) To enable or empower any other person than themselves, their proper officers, agents and employees to dictate or control the management of business, contrary to the spirit and meaning of this chapter; or

(i) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this chapter.

Any corporation, domestic or foreign, or any partnership, or individual, or other association, or person whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to any trust or combine as hereinabove defined shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties hereinafter provided. Any person, association of persons, corporation, or corporations, domestic or foreign, who shall be a party or belong to a trust and combine shall be guilty of crime and upon conviction thereof shall, for a first offense be fined in any sum not less than one hundred dollars ($ 100.00) nor more than five thousand dollars ($ 5,000.00) and for a second or subsequent offense not less than two hundred dollars ($ 200.00) nor more than ten thousand dollars ($ 10,000.00), and may be enjoined by a final decree of the chancery court, in a suit by the state on the relation of the attorney general, from the further

prosecution of or doing of the acts constituting the trust and combine as defined in this chapter.

Miss. Code. Ann. § 75-21-9 (2008). Private persons and corporations may sue

Any person, natural or artificial, injured or damaged by a trust and combine as herein defined, or by its effects direct or indirect, may recover all damages of every kind sustained by him or it and in addition a penalty of five hundred dollars ($ 500.00), by suit in any court of competent jurisdiction. Said suit may be brought against one or more of the parties to the trust or combine and one or more of the officers and representatives of any corporation a party to the same, or one or more of either. Such penalty may be recovered in each instance of injury. All recoveries herein provided for may be sued for in one suit.

Miss. Code Ann. § 75-24-5 (2008). Prohibited acts or practices

(1) Unfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce are prohibited. Action may be brought under Section 75-24-5(1) only under the provisions of Section 75-24-9.

(2) Without limiting the scope of subsection (1) of this section, the following unfair methods of competition and unfair or deceptive trade practices or acts in the conduct of any trade or commerce are hereby prohibited:

(a) Passing off goods or services as those of another;

(b) Misrepresentation of the source, sponsorship, approval, or certification of goods or services;

(c) Misrepresentation of affiliation, connection, or association with, or certification by another;

(d) Misrepresentation of designations of geographic origin in connection with goods or services;

(e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(f) Representing that goods are original or new if they are reconditioned, reclaimed, used, or secondhand;

(g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(h) Disparaging the goods, services, or business of another by false or misleading representation of fact;

(i) Advertising goods or services with intent not to sell them as advertised;

(j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(k) Misrepresentations of fact concerning the reasons for, existence of, or amounts of price reductions;

(*l*) Advertising by or on behalf of any licensed or regulated health care professional which does not specifically describe the license or qualifications of the licensed or regulated health care professional;

(m) Charging an increased premium for reinstating a motor vehicle insurance policy that was cancelled or suspended by the insured solely for the reason that he was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. It is also an unfair practice for an insurer to charge an increased premium for a new motor vehicle insurance policy if the applicant for coverage or his covered dependents were previously insured with a different insurer and canceled that policy solely for the reason that he was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. For purposes of determining premiums, an insurer shall consider such persons as having maintained continuous coverage. The provisions of this paragraph (m) shall apply only to such instances when the insured does not drive the vehicle during the period of cancellation or suspension of his policy.

Miss. Code Ann. § 75-24-15 (2008). Action or counterclaim by individual suffering loss; class actions prohibited

(1) In addition to all other statutory and common law rights, remedies and defenses, any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use of employment by the seller, lessor, manufacturer or producer of a method, act or practice prohibited by Section 75-24-5 may bring an action at law in the court having jurisdiction in the county in which the seller, lessor, manufacturer or producer resides, or has his principal place of business or, where the act or practice prohibited by Section 75-24-5 allegedly occurred, to recover such loss of money or damages for the loss of such property, or may assert, by way of setoff or counterclaim, the fact of such loss in a proceeding against him for the recovery of the purchase price or rental, or any portion thereof, of the goods or services.

(2) In any private action brought under this chapter, the plaintiff must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General.

(3) In any action or counterclaim under this section of this chapter, a prevailing defendant may recover in addition to any other relief that may be provided in this section costs and a reasonable attorney's fee, if in the opinion of the court, said action or counterclaim was frivolous or filed for the purpose of harassment or delay.

(4) Nothing in this chapter shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person.

15 U.S.C. § 1121. Jurisdiction of Federal courts; State and local requirements that registered trademarks be altered or displayed differently; prohibition

(a) The district and territorial courts of the United States shall have original jurisdiction, [and] the courts of appeal of the United States (other than the United States Court of Appeals for the Federal Circuit) [and the United States Court of Appeals for the District of Columbia] shall have appellate jurisdiction, of all actions arising under this Act, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

(b) No State or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names, or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.

Fed. R. Civ. P. 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

* * *

Fed. R. Civ. P. 58. Entering Judgment

* * *

(b) Entering Judgment.

(1) *Without the Court's Direction.* Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(2) *Court's Approval Required.* Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 05-2390 V
Jury Demanded

[Filed August 18, 2007]

MEDISON AMERICA, INC., a California Corporation	)
Plaintiff,	)
v.	)
PREFERRED MEDICAL SYSTEMS, LLC, a Tennessee limited liability company,	)
JERRY K. McGUIRE and	)
GREGG REED,	)
Defendants.	)

PLAINTIFF'S RESPONSE TO THE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW, plaintiff, Medison America, Inc. (hereinafter, "**Plaintiff**"), and responds, *seriatim*, to the enumerated statements of defendants, Preferred Medical Systems, Inc., Jerry K. McGuire and Gregg Reed, (hereinafter "**Defendants**"), filed on July 10, 2007 (Dkt. Entry 96, Exhibit #2).

Plaintiff, by responding, concedes nothing about whether Defendants' statements are inclusive or exclusive, well stated or poorly stated, have weight or weightless, are relevant or irrelevant, are supported/supportable or unsupported/unsupportable or in any other way anything but strings of words strung together in an attempt to make sentences. Plaintiff, here, rotely responds to what Defendants have posited.

No.	Defendants' Statement	No.	Plaintiff's Response
1.	The Plaintiff Medison America, Inc. ("Plaintiff" or "Medison America") is a California corporation. The Plaintiff is owned by Medison Co., Ltd. ("Medison, Ltd."), a Korean company. Medison, Ltd. manufactures ultrasound equipment. [*See* First Amended Complaint, Dkt. No. 2 (Amended Complaint") ¶¶ 1-3].	1.	Undisputed but of no probative significance to any dispositive issue related to Defendants' SJM.

2.	The Plaintiff Medison America sells ultrasound equipment throughout the United States. The ultrasound equipment sold by the Plaintiff is manufactured by Medison, Ltd., a Korean Company *[See* Amended Complaint, ¶¶ 33-34].	2.	Undisputed but of no probative significance to any dispositive issue related to Defendants' SJM.
3.	General Electric Company ("GE"), a New York corporation, manufactures ultrasound equipment. *[See* Amended Complaint, ¶ 27; Declaration of Jerry Kirkland McGuire ("McGuire Declaration") ¶ 3, attached as SJ Exhibit 2.].	3.	Undisputed but of no probative significance to any dispositive issue related to Defendants' SJM.
4.	Preferred Medical Systems, LLC ("Preferred Medical") is a Tennessee limited liability company. *[See* Amended Complaint, ¶ 24].	4.	Undisputed but of no probative significance to any dispositive issue related to Defendants' SJM.
5.	Preferred Medical is an independent manufacturer's representative for GE	5.	Neither Louisiana nor Arkansas are Contiguous States, as defined in the First

	in the sale of ultrasound equipment, serving such capacity in the States of Tennessee, Mississippi, Alabama, Arkansas, Louisiana and Georgia. *[See* McGuire Declaration ¶ 4]		Amended Complaint (Dkt. Entry 2, p. 19, para. 28) and are not alleged to be states where Plaintiff and Defendants compete; therefore, except for use by Plaintiff as like and similar evidence, what Defendants did or do in Arkansas and Louisiana is not germane to anything at issue in the instant case, but, as will be seen below, Defendants skew statistics on which Defendants rely by inclusion of Arkansas and Louisiana without providing data by which to break out Arkansas and Louisiana.
6.	There are at least 3,000 potential purchasers of ultrasound equipment in the OB/GYN market within the States of Tennessee, Mississippi, Alabama, Arkansas, Louisiana and Georgia *[See* McGuire Declaration ¶ 5].	6.	Neither Louisiana nor Arkansas are Contiguous States, as defined in the First Amended Complaint (Dkt. Entry 2, p. 19, para. 28) and are not alleged to be states where Plaintiff and Defendants compete; how many of the supposed 3000 "potential purchasers" to which Defendants make

			reference there are in Arkansas and Louisiana is both an irrelevancy and not known in this record,; therefore, 3000 is a meaningless base from which to draw any conclusions relevant to any issue in this case. Further, the "purchasers," though not otherwise identified, might reference physicians, and the number of physicians is not determinative of the number units of ultrasound equipment potentially able to be sold, the sale of which is that for what Plaintiff and Defendant compete; the competition is for sales and to equate the number of physicians with the number of potential sales is a faulty comparison. Second Affidavit Of Mary Margaret Little (Dkt. Entry 122).
7.	GE has at least 23 service and support personnel in the States of Tennessee, Mississippi, Alabama Arkansas, Louisiana	7.	Neither Louisiana nor Arkansas are Contiguous States, as defined in the First Amended Complaint (Dkt. Entry 2, p. 19,

	and Georgia to repair and service ultrasound equipment. [*See* McGuire Declaration ¶ 6, S.J. Exhibit 2]		para. 28) and are not alleged to be states where Plaintiff and Defendants compete; how many of the "23 service and support personnel" there are in Arkansas and Louisiana is both an irrelevancy and not known in this record. However, how many "GE has" is indicative of nothing. The question is whether Plaintiff, by Plaintiff's methods, provides service and/or service equal to GE.
8.	Plaintiff only has two (2) service and support personnel in the United States, both of whom reside in California. Plaintiffs Rule 30(b)(6) designated corporate representative testified as follows: Q. You told us earlier that Medison has, I think, 16 employees? A. No, I said 19. Q. Nineteen. Are any of those employees service technicians? A. Two of them.	8.	**Deposition Of Robert DePalma (Dkt. Entry 119, pp. 162-165):** Q: I'm a Customer in TN and my Medison 8000 is not performing the way I want it to perform. What can I do? A: You call your dealer. Your dealer has trained personnel in his employ, or in his contract. He will dispatch that person, usually with parts, sometimes w/o parts. They will determine what the problem actually is and

	Q. Where do they ~ where do they reside? A. They work out of the head office. Q. That's in California? A. Yes. [*See* Deposition of Medison America, Inc., by and through its corporate designee, Robert DePalma ("Medison Dep."), taken on March 9, 2007, p. 161. Copies of the pertinent portions of the Medison Dep., cited herein, are attached collectively as SJ Exhibit 31.		repair it. Q: For the states that are at issue in this litigation, who performs the service? A: That is BioCore's choice, but they have used in the past, David Koster. * * * Q: So if I'm a customer in Mississippi. let's say New Albany and I have a problem with my Medison 8000 and I call BioCore, who is coming to fix it? A: Shane Spencer Q: Who is Shane Spencer? A: Shane Spencer is a service engineer that works directly for BioCore out of their Kissimmee, Florida office. * * * Q: Is there anybody else that BioCore employs to repair ultrasound machines that it sells to the end user? A: For minor repairs, meaning a probe exchange, things like that, usually, it's

			diagnosed by one of my people at headquarters, and they will send a replacement. And that's the end of the service of that. It will be followed up by the sales team just to make sure the customers happy, meaning, BioCore sales, Mark Patterson, and/or Martin Harris. * * * **Deposition Of Robert DePalma (Dkt. Entry 119, pp. 180-181):** Q: Let's focus for now on what actually has occurred. The customer satisfaction survey, is that what you called it? A: Yes * * * Q: Did that include questions about service and support? A: Yes, I believe it did * * * Q: And what were the result of those eight or nine percent who responded? A: I believe the customer satisfaction

			was in the 87 to 88 percent range. Q: How about the satisfaction with their service and/or support? A: That was what I was speaking to. Q: How does that compare with the satisfaction that GE customers have with the service and support provided by it? A: You're asking me for inside information for GE that I probably don't have. Q: Well, do you have it or do you not have it? A: I know that what ECRE says, ECRE is an independent organization that measures that sort of thing. And says that GE is right in the high 80s right now. Q: And what does that publication say about Medison? A: We tend to be kind of small for them. They don't say much about us.

			Deposition Of Martin Harris (Dkt. Entry 108, Exhibit # 1, p. 182): Q: Which of the service technicians that you use as an employee or through a contractual arrangement or per diem arrangement services your customers in Mississippi? A: All of them could or would Q: And I guess what I'm trying to get at, are any of your technicians kind of associated with specific geographical areas? A: No Q: All right? A: We'll use whoever we need to take care of the complaint in a timely fashion. So, there is, you know, no. * * * Q: Let me follow up and see if I understand. If service is performed on behalf of a customer by Medison, it this what Medison charges BioCore for that service? A. I want to clarify

			service for you. We provide the service to our clients. Q: Yes, sir? A: I'm the one that pays for a service engineer or one of my retained people to go out and work on the product. This is simply after warranty, if I wanted to buy a contract from Medison that would give me a comprehensive part to include probes depending on which of these items you collect, so if my customer out of warranty had a part failed on the machine and I took a contract with Medison, then I would get these parts at no cost besides paying the premium, if you will. * * * **Deposition Of Martin Harris (Dkt. Entry 108, Exhibit # 1, pp. 208-209):** Q: And if a customer of yours called up and said my probe is out, I've got 35 patients here who are expecting ultrasounds, do you say, send it back,

			we'll send it to Korea? A: No Q: What do you do for that customer? A: We generally ship that customer next day air, so they have it the following morning. If it's in the afternoon, we'll try to get one out that same day and that's not always feasible, but if they're down, we're on top of it immediately. Q: And the implication that the doctor is just going to have to wait for it to be repaired in Korea and sent back to him is a false notion? A: Very false. That's not anywhere true.
9.	In January 2002, Medison America's parent company Medison, Ltd. entered into a receivership procedure in Korea wherein its primary lender assumed joint control of the company along with Medison, Ltd.'s existing management. Plaintiff alleged this fact as follows:	9.	Undisputed

	In January 2002, in a receivership procedure unique to the law of Korea, Medison Ltd. became co-managed by the chief executive officer of Medison Ltd, with Medison Ltd.'s governing board of directors and Medison Ltd.'s chief lender, Hana Bank, Seoul Korea. [*See* Amended Complaint, 15].		
10.	In a memorandum to the Plaintiff Medison America, the Korean legal counsel for Medison, Ltd. stated that the reorganization proceedings in Korea were similar to chapter 11 proceedings in the Untied States (the "Korean Legal Memo"). The Korean Legal Memo stated in relevant part: Medison is currently undergoing	**10.**	**Numbers 10, 11, 12 and 13 are responded to collectively:** **Deposition Of Robert DePalma (Dkt. Entry 119, pp. 147-149):** Q: And Medison, in fact, did undergo a corporate reorganization of sorts; is that right? A: Yes, they did. Q: And can you—when was that? A: I don't know the specific dates. But it was called a receivership. And my understanding

	corporate reorganization proceedings under the Company Reorganization Act of Korea **(which is similar to Ch. 11 proceedings in the U.S.)** [*See* Exhibit 11 to Medison Dep., which is attached hereto as part of collective SJ Exhibit 3, (emphasis added)].		of Korean law, and how it's been explained to me was that if even one bank notice defaulted---and a default does not mean within a grace period, it means within the absolute date necessary to be received, the due date---that it automatically goes to receivership just for the purpose of ensuring that the companies don't go bankrupt. It is a mechanism built into Korean law to make sure the companies don't go into bankruptcy and get bought out by other companies. Q: And I assume, having been in the business world for a number of years, you have some understanding or familiarity with bankruptcy here in the United States as well; is that right? A: Yes Q: And you understand that there are different types of bankruptcy, including Chapter 7, 11, and 13? A: I've heard of all of them

			Q: And when—when Medison Korea defaulted on this loan— A: I have no specific knowledge that they actually defaulted on a loan. My understanding is that if that happens, this happens. We were never given the specifics of why receivership was put into effect. Teo Han would have that answer. Q: Okay. What was Medison America told, if anything, about the problems going on in Korea? A: We were told that we were in receivership, that there was nothing to worry about, that we would then be protected so far as debtors making claims against all debts so that it couldn't be cleaned out, that the company was going to become more solvent than ever it had been. And as it turned out, it was. * * * Q: And in this letter [referencing Exhibit 11], your Korean lawyers specifically analogize

			the corporate reorganization that Medison was undergoing to Chapter 11 proceedings in the U.S., is that right? A: No. What is says is, which is similar to. It doesn't mean the same thing. That just means that there's a reorganization, but that there is no proceeding undergoing, as far as I understand, of bankruptcy at that point. The business was still buying equipment. The business was still selling equipment. The management team was still in effect. Everything was the same until they were going to petition the court to say, we'd like to make all these changes to make a healthier company. * * * [at 57] Q: So what are those notes that Medison America owed to its parent? [referencing Exhibit 13]

			A: As I said, in earlier days, there would have been infusions of cash that would not have been gifts. They would have all been loans. And those would be to start new processes, whether that was a new marketing campaign, or bringing new products into the country, we introduced three new products to the industry. So, since we had separate financials, and have always had separate financials from the parent company, I can only, again, guess as to why those monies would have been infused at the time. But it would have made sense that the company, Limited, would have benefited by Medison America doing well.
11.	The reorganization proceedings were conducted under the Company Reorganization Act of Korea, which states the following as its purpose:	11.	See Response to No. 10

	The purpose of this Act is to coordinate the interest of creditors, stockholders and other interested persons, and to strive for the reorganization and recovery of the business, in respect of any joint stock company (hereinafter in this Act referred to as the "company") **which faces imminent bankruptcy due to poor financial circumstances,** but which is likely to recover economically. [*See* Company Reorganization Act of Korea, Article 1 (emphasis added), a copy of the Company. Reorganization Act of Korea is attached as S.J. Exhibit 5.]		
12.	Under the Company Reorganization Act of Korea, a company in the reorganization	12.	See Response to No. 10

	proceedings may be liquidated in certain circumstances. [See Company Reorganization Act of Korea, Article 191 (Programs for Liquidation), S.J. Exhibit 5]		
13.	Plaintiffs own auditors described Medison, Ltd.'s proceedings as a "bankruptcy" in a note to the Plaintiffs 2003/2004 Financial Statements. [*See* Exhibit 13 to Medison Dep., Note 4 "Related Party Transactions", p. 12, which is attached as part of S.J. Exhibit 3 hereto]	13.	See Response to No. 10
14.	The United States Bankruptcy Court for the Southern District of New York described the proceedings under the Company Reorganization Act of Korea as follows: The record confirms that Korean bankruptcy law, and in particular the	14.	Undisputed but of zero significance to any issue in the instant case. What the "record" was in that case is unknown to the record in the instant case, and what the unknown record in that case "confirms" relative to the unknown records in that case is unknown to the record in the instant case; further, the statement

	Company Reorganization Act, is substantially similar to United States law. ***In re Petition of Kyu-Byung Hwang***, 309 B.R. 842, 846 (Bankr.S.D.N.Y. 2004) (affording comity to Korean reorganization proceeding).		that what the unknown record in that case confirmed was "substantially similar" connotes that there were differences and leaves open that the record in the instant case might prove that the differences are more substantial than the likeness. Moreover, the question at hand involves Plaintiff, and it is indisputable that Plaintiff has never been involved in any bankruptcy or anything substantially or insubstantially similar to a bankruptcy or reorganization. If a person made statements about a saintly person, portraying him as a murdering child molester, facts true as to the saintly person's twin, would be a defense to claim that the maker of the statements was just confused because he "mistakenly" failed to take note that the saintly person had a twin?

15.	According its own financials statements, the Plaintiff Medison America had a multi-million dollar deficit in the year 2003, with liabilities exceeding its assets by $25,845,091, and a multi-million dollar deficit in the year 2004, with liabilities exceeding its assets by $24,671,941. [*See* Exhibit 13 to Medison Dep., pp. 4-5 which is attached as part of SJ Exhibit 3 hereto]	15.	From the income statements on which Defendants rely, Plaintiff made a positive net income in 2004 and 2005, so, despite liabilities (most to the parent), Plaintiff is making positive gain, and Plaintiff moving upward in net profit with the drag of liabilities show exception stability. 2004 and 2005, Plaintiff had accounts payable and payments due to the parent by which Plaintiff is owned. These accounts payable may not be important to the Plaintiff's long term viability. The statement of assets/liabilities is true, but what the statement means from a financial stability standpoint cannot be gleaned from the statement without much more being known, by a person qualified to analyze, than is revealed by the statement. Plaintiff's financial problems did not force it into bankruptcy proceedings.

			As the airlines indicate, being in bankruptcy does not mean a company is not able to deliver products and services. Plaintiff continues to deliver product through this period.
16.	Plaintiff, through its Rule 30(b)(6) corporate representative Robert DePalma, confirmed the accuracy of the Plaintiffs financial statements. DePalma testified: Q. And whose job was it to go over these financial statements? A. [DePalma] This would be Victoria Murphy, and these were all audited by the same audit team that we used up until last year. Q. Who is that audit team? A. I'd have to check. Its name escapes me. Q. But someone would review these to ensure that these obviously were accurate – A. Absolutely.	**16.**	Undisputed

	Q. -- financial statements? A. Yes. Q. And so, all of the statements made in there would be accurate and ~ as far as you would know as a representative of the company? A. Yes. (*See* Medison Dep., pp. 158-159].		
17.	Plaintiffs Complaint alleges that Defendants made certain disparaging statements to potential purchasers, and Plaintiffs Rule 26 Disclosures lists prospective customers that it contends did not purchase its product because of the alleged disparaging statements. /*See* Amended Complaint, ff 129-148; and, Plaintiffs Rule 26 Disclosures, Exhibit A, a copy of the cited portions of which is attached hereto as SJ Exhibit 61. These two documents, as cited	**17.**	The First Amended Complaint is attested by oath (Dkt. Entry 2, p. 47) and explicitly alleges that there are incidents in addition to those specifically alleged and there is no limitation on the additional incidents that restricts the additional incidents to those identified in the Rule 26 Disclosures, i.e., the disclosures are limited to those then and now known, but the fact that an incident is not now known does not mean that the incident does not exist and may become known. (Deposition Of Martin Harris, (Dkt. Entry 108,

	and collectively, identify the universe of customers to whom Plaintiff alleges Defendants made disparaging statements about Plaintiff and/or its products (hereinafter, the identity of the prospective customers shall be referred to as the "Prospective Customers").		pp. 200-201); First Amended Complaint, (Dkt. Entry 2, pp. 93-95, para. 151-153).
18.	None of the Prospective Customers owned Medison ultrasound equipment prior to the time of the alleged statements. [*See* Plaintiffs Admissions No. 30, S.J. Exhibit 4]	18.	Undisputed but of no probative significance to any dispositive issue related to Defendants' SJM. Is the implication that disparaging statements otherwise unlawful are lawful, if a person to whom the statement was made did not previously own Plaintiff's ultrasound equipment?
19.	Defendants Preferred Medical, McGuire and Reed did not make any false or misleading statements of fact concerning the Plaintiff or Plaintiffs products or services to the Prospective	19.	**The Medison Story** Defendants allege that the "Medison story" Plaintiffs refer to is vague and that no clear evidence has been provided to prove the

	Customers. [*See* McGuire Declaration ¶¶ 7-8, SJ Exhibit 2; and, Declaration of Greg Reed ("Reed Declaration") ¶¶ 7-8. A copy of the Reed Declaration is attached hereto as SJ Exhibit 7.1		behavior alleged by Plaintiff. Simply put, the Affidavit of Mary Margaret Little (Dkt. Entry 30), the Affidavit of Cheryl Martin (Dkt. Entry 31-2), the Second Affidavit of Mary Margaret Little (Dkt. Entry 122) and the Deposition of Mary Margaret Little (Dkt. Entry 114), establish that the "Medison story," is terminology coined by Defendants to summarize the statements Defendants used to disparage Plaintiff. More specifically, these affidavits and deposition, excerpted below, outline the circumstances in which disparaging statements were made by Defendants. This contrasts with Defendants contention that no disparaging statements were made. The Affidavit and Second Affidavit of Mary Margaret Little shows the process used by

			Defendants in developing the "Medison story," as well as the circumstances in which Defendants iterated and reiterated the "Medison story" to customers. Ms. Little is clear that bankruptcy, poor service, "out of business," and "going under" were the themes repeatedly stated to customers as the "Medison story." Cheryl Martin's affidavit discusses the "Medison story" on a more specific level. Her experience relates to Kirk McGuire specifically and her interactions with him, her business trips as part of his sales team, her experience in relating a prefabricated "story" to potential clients, the techniques used to maximize the pros and cons of GE and Medison products, respectively, and the specific verbiage and repertoire used by Defendants – in essence, the "Medison story."

			Defendants are mistaken in contending Plaintiffs lack concise facts to support the "Medison story." Ms. Little outlines the circumstances in which the "Medison horror story" was repeated (Affidavit Of Mary Margaret Little Dkt. Entry 30, p. 10): A. Well, there would be discussions – I mean, there may be 20 reps on the conference call, and there would be discussions about the Medison horror story. And whoever heard the story would share it for the others to go out and use. Q: Do you know if they had any reason to believe that the story was not true that they were sharing with the group? A. No. Q. Have you ever heard – you told me about representatives of Preferred who you say made disparaging statements about Medison. Did they – did

			you hear them make these statements to customers or potential customers? A. Yes. Further defining the "Medison story" is the Deposition Of Mary Margaret Little (Dkt. Entry 114, Attachment #1, p. 102): A. Well, I can make it real easy for you instead of going down the list because we all told the same story. We all had the same verbiage. * * * [at 102, lines 13-24] A: ...I heard the words Medison, bankruptcy, out of business, no – can't service. The exact, you know, linking verbs, I don't know. But you could walk by an office, and any time anybody was on the phone discussing GE Viason (sic: Voluson) 730 versus Medison, that was what you had been trained to say. You're talking about me, Sheryl Martin

			and Kim Wilson, none of who had significant training in sales. We were only modeling what we had been taught, and we weren't even questioning if it was true or not. Because we believed this person that was very successful in business, and told us that this was true...". [at 103, lines 10-24] A. Medison, bankruptcy, out of service, not able to get service, Aunt Minnie. I do know that Kim was instructed to pull that report. And I did hear her sharing that on the phone with a customer. Aunt Minnie M-I-N-N-I-E DOT COM. Q. What specific -- other than you – did you actually hear Ms. Wilson say to the customer something about Aunt Minnie? A. Yes. Q. Okay. What did you hear her say to the customer about Aunt Minnie? A. Something about that there was a report on

			Aunt Minnie about Medison being in bankruptcy. And they could go to that web site and see it, or she could show it to them when she met with them. Also see p. 104, lines 10-14 Q: What about Mr. [Scott] Martin, what did you hear Mr. Martin say to any customer? A. Bankruptcy, going out of business, why would you buy from them. GE is a leader, they're in bankruptcy, won't be able to get parts, you don't want to do that. In reference to the sales technique that McGuire employed, M. Little states [at pp. 105 -106]: A: We had been instructed not to bring Medison up unless the customer did. There would have been no reason for him to be discussing Medison if the customer hadn't already looked at it.

			M. Little testifies [at pp. 112 -113]: Q. What about Mr. McGuire, what statements about Medison did you actually hear him make to a customer? A. That Medison was in bankruptcy. That they were taking a risk to purchase Medison equipment because even though it was cheaper and the image quality may be decent, what were they going to do if a probe went out or a board went out and the company is in bankruptcy and can't manufacture any more, they're going under. And then, you're sitting there with a system that yes, may be $30,000 less than mine, but you can't use it. And you've paid for it or you've leased it. A leasing company doesn't care if you can't get a part. If you're not paying your bill, the leasing company is going to come in and take the system away.

			He instructed me, and I'm sure, others. The Deposition of Mary Margaret Little outlines the "Medison story." (Dkt. Entry 114, Attachment #1, pp. 106 - 107): Q: What statements did you make to customers about Medison while you were employed at Preferred? A. That Medison was in bankruptcy, why would a customer – or why would you, if I'm talking to the doctor, why would you want to buy cheaper ultrasound equipment that you may not be able to get service on because the company is a floundering, foreign company, in bankruptcy. It's on the Internet, you can pull it up. See for yourself. It may be cheap, but there is reason for being cheaper. Why would you invest your money with a company like that instead of a leader like GE? I would reference horror stories.

			Q. What horror stories would you reference? A. Well, the most famous one was an account down in Louisiana who had problems with Medison unit and said that the service man or the salesman told her to get a screwdriver and go into the keyboard. Q. And did you give that customer – the customer's name? A. I did. Q. Who was the customer? A. I don't remember. Q. But you were supplied with the customer who actually had that experience? A. Yeah, the customer told me that. Q. What did the customer tell you? A. That she had had a service problem with their Medison unit. And they were told to get a screwdriver and go in to the keyboard and do this and that until service could come out. And they didn't know when that would be. Q. So after you had

			heard this from a customer, you repeated it to other potential customers? A. I told Kirk about it, and he said, oh, that's a good one, remember that one. Write her name down, write her phone number down and reference her any time you tell the and Medison story. Q. And did you do that? A. I did. Q. So they could call it and verify it themselves, right? A. If they chose to. Q. And you actually heard that customer tell that story about Medison Service? A. I did. Q. Anything else? A. Anything else I said? Q. Yes ma'am. A. About Medison? Q. Yes ma'am. A. It was pretty much the same story over and over. Q. Which customer did you tell that story to? A. Any customer who was looking at 4D and 3D, 4D equipment who had a flier laying on

			their desk from Medison or said they had booked a demo or had a demo or about to purchase Medison. Deposition of M. Little (Dkt. Entry 114, Attachment #1, pp. 113-114): Q. Do you know any customer he made any of the statements you've just listed to? A. I believe a Dr. Sigman out of Alabama. Q. Were you present when Mr. McGuire spoke with Dr. Sigman? A. No. But I heard him going down the hall, talking about he had told him the Medison story. Q. Okay. Did you hear Mr. McGuire make any statements to Dr. Sigman? A. No. Q. Were you there when he did the demo? A. No. Q. Were you there when he made phone calls to Dr. Sigman? A. I don't know. There were lots of times that I

			sat in on – when he was on calls. And I don't remember now what doctor he was speaking with. Q. And that's all I'm asking, okay. I'm just asking you what you do know and what you don't know. A. Okay. Q. Okay. Now, what statement – what statement did you hear him make about his conversation with Dr. Sigman? A. That he had told him the Medison story. He was going to take a different look – take another look. With reference to the May 18, 2004 letter from Plaintiff to Defendants, copied verbatim in Plaintiff's response in opposition filed as Dkt. Entry 128, pp.6-7, see the Deposition of M. Little (Dkt. Entry 114, Attachment #1, pp. 111-112): A. He [DePalma] asked me was I aware that they had filed suit

			against Preferred Medical. He didn't understand that Kirk was my brother. He thought I was a sister-in-law or something, he didn't know. And I said, no, that I wasn't, but I wasn't surprised. Because when I worked for Kirk, he called us all in his office one day and Medison had seen the letter to cease and desist the disparaging statements that we were making then. And he laughed about it and said that he would write his own letter to the attorneys because it wasn't worth paying an attorney to write one. That, you know, they weren't going to do anything to him. And I knew that it hadn't stopped, that it had never stopped up until – I mean, I don't know what happened there after I left other than what I've heard out in the field, that it's still being said. But I just told him that I wasn't surprised. Q. I'm sorry?

			A. And he asked me would I be willing to tell what I knew to their attorney – that they had an attorney in Memphis. And I said yes, I would, and that he might want to talk with Sheryl (sic) Martin too, because she and I traveled together. And we told the same story, we'd been trained by the same person. Q. That person was Kirk McGuire? A. Yes. See also the Affidavit of Cheryl Martin (Dkt. Entry 31-2) as follows: ➢ The process by which the demonstrations were conducted **(page 7)**, ➢ At what point during the sales presentation the "sales story" was given by Kirk McGuire **(page 7)**, ➢ The factual information used in McGuire's technique of emphasizing GE over Medison **(pages 8,9)**, ➢ At what point during the sales presentation McGuire would tell the

			"Medison story" **(page 21)**,McGuire's conversation with Ms. Martin that GE had bought out Kretz and Medison's technology, including specifically on as follows **(page 39)**: CLM: The next time I heard about Medison, Kirk told me that GE had bought out Kretz. Then, he said the GE bought Ketz/Medison's technology. He said the Medison company wasn't a strong enough company to do all the advertising and everything that GE had the money to be able to do. Kirk said Medison was going bankrupt. GE bought them out. It was not far in between, when he told me about it and when we started training on the equipment.... LEP: Did Kirk add that Medison was going bankrupt? CLM: Yes. That is the way Kirk described it to me.

			Also see the Affidavit of Cheryl Martin (Dkt. Entry 31-2, pp. 41-42): LEP: When did you start running into Medison? CLM: Immediately. Kirk would say that he had heard about the Medison service issues. And, that GE had bought Medison and that now our service was good, and so one and so forth, and that we would take care of everything, now. LEP: Kirk told you that GE had bought Medison – the company? CLM: Yes. LEP: Did you know that Medison even existed anymore? CLM: No! That is why I asked Bob DePalma. I asked him: 'I always wondered if we bought the company out, and bought the technology. How can Medison be making the equipment and having the technology? How can that be?' I never knew. No one ever explained to me that, no, GE did not

			do that. No, Medison was not in bankruptcy. LEP: Where did this bankruptcy story come from? CLM: On the internet. It was an article on Aunt Minnie. It was the one that Kirk had with him, copied off. He gave me a copy of it, and he had it highlighted – just the area about Medison and bankruptcy was all that was highlighted. LEP: Was that used in the sales presentation's concerning the 3D and 4D equipment? CLM: In the very beginning, he wouldn't bring it out. If Medison came up, he would always talk about their service issues and their poor image quality on the 2D probes. Before Medison came in, Kirk had to present the story, before Medison could get its foot in the door, because Medison equipment is going to be much cheaper than what GE sells it for, or less than what Kirk would sell it. Kirk knew that if Medison ever got

			its foot in the door, GE was going to be blown out of the water. LEP: From the beginning of your sales with Voluson, had you to be schooled by Kirk in what to say "If?" CLM: Yes. And, given the article to back it. LEP: Did you carry the Aunt Minnie article with you? CLM: Yes. It was in my Daytimer. Also see the Affidavit of Cheryl Martin, as follows (Dkt. Entry 31-2, p. 43): LEP: When Kirk used the bankruptcy story, what was he using it to convey about Medison? CLM: That Medison was financially going under. LEP: How would that be a part of the presentation? CLM: He would discredit Medison. He would challenge a doctor with: 'Why would you invest in a company that the equipment has gone under? They are gong bankrupt!' He wouldn't

			put it that way – he would say: 'This is your decision to make, I can just give you the information that I have. I can just tell you what I know, then, it is up to you to make your own decision.' Kirk put it that way to for the doctor to decide; Kirk was appearing to give the doctor all the information for the doctor to make his own decision, but, if the doctor believed what Kirk said, only a fool would buy Medison. Also see the Affidavit of Cheryl Martin, Dkt. Entry 31-2, p. 50: LEP: After you heard that GE purchased Medison, did you have your training in Memphis with the lady from Austria? CLM: Yes. LEP: After that, was Kirk still using the story about Medison in bankruptcy? CLM: Yes.

			Also see the Affidavit of Cheryl Martin, Dkt. Entry 31-2, p. 58: LEP: When you say: 'They were never in bankruptcy,' without using the word 'bankruptcy,' can you tell me what you are intending to say about Medison? CLM: That Medison is a company that is about to go under, because it doesn't have the financial stability to live up to its promises. Also see Sigman Aff. (Dkt. Entry 123), Austin Aff. (Dkt. Entry 126), Myra Therber Aff. (Dkt. Entry 125) and Carl Barton Aff. (Dkt. Entry 124), M. Harris Depo (Dkt. Entry 108), M. Patterson Depo (Dkt. Entry 109) and Second Affidavit Of Mary Margaret Little (Dkt. Entry 122).
20.	In its Response to Interrogatories, the Plaintiff stated that the information upon which it Based the	20.	That on which the First Amended Complaint (Dkt. Entry 2) is based, is not conclusive of what evidence exists, either at

	Amended Complaint came "exclusively from" Mark Patterson, Mary Margaret Little and Cheryl Martin. [*See* Plaintiffs Answer To Defendant General Electric Company's First Interrogatories To Plaintiff, Answer No. 1, attached hereto as S.J. Exhibit 81. Plaintiff added one more individual to this list, Martin Harris, during its deposition. [*See* Deposition of Medison America, Inc., by and through its corporate designee, Robert DePalma ("Medison Dep."), taken on March 9, 2007, pp. 101-107, attached as S.J. Exhibit 31		the time or subsequently, for use in proving that which Plaintiff used to constitute the probable cause on which to base the First Amended Complaint (Dkt. Entry 2).
21.	Plaintiffs witness Mark Patterson has an agreement with Bio-Core, Inc. to assist them in the sale of Medison ultrasound equipment. [*See* Deposition of Mark Patterson, taken on March 23, 2007 and on May 21, 2007	21.	Undisputed. However Plaintiff is not offering this portion of Mark Patterson's testimony for the truth of the matter asserted, Plaintiff is offering this testimony with testimony about other out-of-court statements by non-parties to show

	("Patterson Dep."), p.17, Copies of the portions of Patterson Dep. cited herein are attached collectively as SJ Exhibit 9.1. Patterson's company and Bio-Core, Inc. are the exclusive distributors of Medison ultrasound equipment in the States at issue in the Amended Complaint. [*See* Patterson Dep., pp. 36-37]. Mr. Patterson testified during his deposition about allegedly disparaging statements made to the Prospective Customers. Mr. Patterson admitted that he was not present at the time that the statements were made and that all of his information as to whether Defendants made these statements is based upon the out of court statements of third parties. He testified: Q: Okay. And let me just make sure I		that there was interaction with Plaintiff's potential customers in the course of Defendants' attempt to sell in competition with Plaintiff and that Plaintiff's potential customers, thereafter, communicated with Plaintiff in such a way (irrespective of the words used or whether the words spoke the truth), that Plaintiff responded to Plaintiffs' potential customers with Plaintiff's (non-hearsay) words and took actions and were diverted in taking planned action, as testified by witnesses (non-hearsay), and these responses were generated and actions were diverted, time and time again, after Defendants' interaction with Plaintiff's prospective customers, one after another, and the responses and actions were atypical and occurred only after prior interaction between Defendants and Plaintiff's potential

	understand the basis for your knowledge on all of these. A: [Patterson]: Sure. Q: As to the doctors identified on Exhibit 3, you were not present when the alleged statement was made by the GE representative, correct, or the Preferred Sales person? A: That's correct. I was not present during that – Q: You were not present to actually hear the statement from the sales representative, correct? A: Correct. Q: And so you are getting the information second-hand from a doctor or another employee in the office; is that right? A: That's correct. [*See* Patterson Dep., p. 144, SJ. Exhibit 9; *see also* Patterson Dep., p. 302, SJ. Exhibit 9]		customers, all of which is non-hearsay circumstantial evidence. (M. Harris Depo., Dkt. Entry 108, pp.195-224), (M. Patterson Depo., Dkt. Entry 109, pp.343 - 420). The fact that an in-court witness testifies to words uttered out-of-court by an out-of court declarant, standing alone, does not create either hearsay or inadmissible hearsay, especially where the ultimate fact at issue is being established by circumstantial evidence and pattern and practice, e.g., a string of sequential occurrences which, considered in isolation one from the other are meaningless but, when linked, create circumstances that prove the ultimate fact (statement by Defendants to customer that did and were designed unlawfully to disparage Plaintiff) with equal or more certainty than an eyewitness account.

22.	Patterson also testified that he did not have any documents containing the allegedly disparaging statements given by the Defendants to any Prospective Customer. Q. You don't have any documents that were given to doctors by Preferred Medical or GE that contain these alleged disparaging statements, right? A. [Patterson] Right. [*See* Patterson Dep., p. 304].	22.	See Response to No. 21
23.	Plaintiffs witness Martin Harris is the sole shareholder and an employee of Biocore, Inc. [*See* Deposition of Martin Harris, taken on May 25, 2007 ("Harris Dep."), p. 25, Copies of the portions of Harris Dep. cited herein are attached collectively as SJ Exhibit 10.] Harris also testified during his deposition about allegedly disparaging statements made to	23.	**See response to Number 21 and 22** M. Harris Depo., Dkt. Entry 108, p. 125: Q: Have you ever been told by a customer or a potential customer that a Preferred Medical representative made a disparaging statement about Medison or Medison's Products? A: Yes Q: Can you, before we go through what they told

	some of the Prospective Customers. However, like Patterson, Harris admitted that he was not present at the time that the alleged statements were made and that he did not hear the Defendants make the alleged statements. Q. First I want to focus on whether you, Martin Harris, have ever heard a Preferred Medical representative make a disparaging statement about Medison; have you actually been present and heard such a statement? A. [Harris] No. Q. Have you ever heard Preferred Medical make a disparaging statement about Bio-Core? A. No. Q. Thank you. Same context, have you personally heard a Preferred Medical representative make a disparaging statement		you, can you tell me who the customers were? A: Robert Sigman, Joe Austin, Henry Flourney

	about Medison's products? A. No. Q. Or Bio-Core's products? A. No. Q. Have you ever seen any documents that you have any reason to believe were created by Preferred Medical that made disparaging statements about Medison? A. No. Q. About Medison's products? A. No. Q. About Bio-Core? A. No. [*See* Harris Dep., pp. 123-124, S.J.Exhibit 10]		
24.	Plaintiffs witness Mary Margaret Little is the sister of Defendant Kirk McGuire and is a former employee of Preferred Medical. Ms. Little's employment with Preferred Medical terminated on or about July 27, 2004. [*See* Deposition of Mary Margaret Little taken	24.	See Second Affidavit of Mary Margaret Little, (Dkt. Entry 122).

	on March 19, 2007 ("Little Dep.") pp. 20, 23. A copy of the portions of the Little Dep. cited herein are attached collectively as SJ Exhibit 11.1)		
25.	Ms. Little testified that while working for Preferred Medical she had made allegedly disparaging statements about Medison, but during her deposition she could not identify any specific customer to whom such statements were made: Q. Can you identify one of those customers for me? A. [Little] There was one in — up around Fayetteville, Arkansas. Q. Do you remember the name? A. I believe I've given it to Mr. Parrish, but I don't recall it off the top of my head. Q. Any other customers that you remember telling that story to, and by that story, I mean what you've described you	25.	See M. Little Depo., (Dkt. Entry 114, p. 109) Q: Any other customers that you remember telling that story to, and by that story, I mean what you've described you would say about Medison? A: Yeah. Every customer that was a potential 3D, 4D customer that brought that up was told that story

	would say about Medison? A. Yeah. Every customer that was a potential 3D, 4D customer that brought that up was told that story. Q. Well, let's talk about what you told customers first. Okay. A. By me, that's what I'm saying, by me. Q. And I understand — I understand your answer. But what I'm asking you is slightly different. And I'm asking you if you remember the identity of any specific customers who you told that story to? A. If you can get the list of the sales that I made when I was in new equipment, then I can identify them. Q. So sitting here today, you don't know the answer? A. I don't remember the names. [*See* Little Dep., p. 109, SJ Exhibit 11].		
26.	Ms. Little similarly failed to identify the	26.	See M.Little Depo, (Dkt. Entry 114, pp. 102-103)

	customers who allegedly heard statements made by Preferred Medical employee Scott Martin, or even what Mr. Martin may have said to them. She testified: Q. How many specific times can you remember? A. [Little] I would say probably three, but I wasn't there long when – after he got there. Q. And each time he said it, did he say the entire litany that you have given, or did he say part of it? What did he say each time? A. I don't know. Q. What customer was he [Scott Martin] talking to? A. I don't know. A customer who was interested in Medison. [*See* Little Dep., p. 105, SJ Exhibit 111.]		Q: What did you hear Ms. Martin say to customers about Medison? A: Medison, bankruptcy, out of service, not able to get service, Aunt Minnie. I do know that Kim was instructed to pull that report. And I did hear her sharing that on the phone with a customer. Q: Did you actually hear Ms. Wilson say the customer something about Aunt Minnie A: Yes Q: Okay, What did you hear her say to the customer about Aunt Minnie? A: Something about that there was a report on Aunt Minnie about Medison being in bankruptcy. And they could go to that web site and see it, or she could show it to them when she met with them.
27.	Ms. Little similarly failed to identify the customers who allegedly heard	27.	See Response to No. 26

	statements made by Preferred Medical employee Kim Wilson: Q. What customer was she [Kim Wilson] speaking to? A. I have no idea. [*See* Little Dep., pp. 103-104, SJ Exhibit 111.]		
28.	During her deposition, Ms. Little identified only one specific customer to whom Defendant Kirk McGuire allegedly made a statement. However, Ms. Little testified that she did not actually hear the statement. Q. Tell me what customer he [Kirk McGuire] told that Medison was in bankruptcy? A. I don't know their names. Q. Do you know any customer he made any of the statements you've just listed to? A. I believe a Dr. Sigman out of	28.	See M.Little Depo, (Dkt. Entry 114, p. 114) Q: What statement did you hear him (Kirk) make about his conversation with Dr. Sigman? A: That he told him the Medison story. He was going to take a different look-take another look **Also, see Sigman Aff. Dkt. Entry 123**

	Alabama. Q. Were you present when Mr. McGuire spoke with Dr. Sigman? A. No. But I heard him going down the hall, talking about he had told him the Medison story. **Q. Okay. Did you hear Mr. McGuire make any statements to Dr. Sigman?** A. No. Q. Were you there when he did the demo? A. No. Q. Were you there when he made phone calls to Dr. Sigman? A. I may have been present for some of those. Q. Well, were you? A. I don't know. There were lots of times that I sat in on - when he was on calls. And I don't remember now what doctor he was speaking with. Q. And that's all I'm asking, okay. I'm just asking you what you do know and what you don't know.		

	A. Okay. Q. Okay. Now, what statement — what statement did you hear him make about his conversation with Dr. Sigman? A. That he had told him the Medison story. He was going to take a different look – take another look. Q. Anything else that you heard him say about his conversation with Dr. Sigman? A. That Dr. Sigman had some financial problems. He didn't know that he was going to be able to get leased anyway, something to that effect about his credit not being good. Something like that. Q. Anything else? A. Not that I remember. (*See* Little Dep.,pp. 113-115 (emphasis added), SJ Exhibit 111.)		
29.	In her affidavit dated January 16, 2006, Ms. Little mentioned	29.	M. Little Aff. Dkt. Entry 30, p. 28

	another customer "Dr. Scott Smith", but again Ms. Little did not hear what McGuire was alleged to have said to this customer. Ms. Little claims that she was with the customer but McGuire was not and had allegedly made the statements to the customer through her cell phone. He got the customer - **had me** give **my cell phone to the customer** so he would make sure that the customer heard the story. I'm pretty sure that office went with us instead of Medison because they were afraid. (*See* Affidavit of Mary Margaret Little, executed on January 16, 2006, ("Little Aff.") p.28. (emphasis added)]. A copy of the entire affidavit was filed by Plaintiff on or about August 25, 2006,		Q. Have you been with Kirk on demos when you heard him doing it? A: I have Q: Can you recall any? A: I've been on demos w/o Kirk where we were in one particular office in Arkansas, Cheryl and I, the customer had already demoed Medison and the sonographer was... telling us the Medison system looked good to him..... I came out of the room and Cheryl stayed in there to do the scan and I was on the phone with Kirk, and told him what was going on. He said well have you told him the Medison story, have you told him they're in bankruptcy have you told him this, and I said well I'm going to get to that. He got the customer- had me give my cell phone to the customer so he would make sure that the customer heard the story.

	Dkt. No. 30. Portions of the Little Aff. cited herein are attached as SJ Exhibit 121)		
30.	Additionally, "Dr. Scott Smith" is not listed among the doctors included in Plaintiffs list of Prospective Customers. /*See* Amended Complaint, ¶¶ 129-148 (Dkt No. 2) and Plaintiffs Rule 26 Disclosures, Exhibit A, SJ Exhibit 6].	30.	The fact Scott Smith is not listed is not prejudicial because the Affidavit Of Mary Margaret Little was filed and served on Defendants on August 25, 2006, (Dkt. Entry 30), and is like and similar, at the very least, even if Dr. Smith was not a customer of Plaintiff.
31.	The only other specific customer mentioned by Ms. Little in her Affidavit is an OB practice in New Albany. However, Ms. Little testified that the customer's decision to purchase a GE product rather than a Medison was based upon negative information he had received from a Medison customer, not from the Defendants: Well, I ran across a doctor in New Albany in the	31.	Undisputed that excerpted testimony, out of context, (e.g., rest of deposition, affidavit and second affidavit) is what it is but dispute the probative significance of the testimony relative to any issue dispositive of Defendant's SJM.

	summer (of 2005) who told me that he was interested in Medison equipment, but he was going to go with GE **because he had spoken with a customer of Medison, and the service was horrible.** [Little Aff. p. 27 (emphasis added), S.J. Exhibit 12]		
32.	Ms. Little also did not speak to any potential purchaser about their reactions to the alleged statements. She testified: Q. Can you identify any doctors who you have spoken to about how the Medison story influenced their decision to buy or not to buy from Medison, any doctors who you have actually spoken to about their reaction to anything said about Medison? A. That I've spoken to about their reaction?	32.	Undisputed that excerpted testimony, out of context, (e.g., rest of deposition, affidavit and second affidavit) is what it is but dispute the probative significance of the testimony relative to any issue dispositive of Defendant's SJM.

	Q. Yes, ma'am. A. I haven't spoken to any doctors about their reaction. Q. Anybody who was making the purchasing decision at a doctor's office? A. It may be the lady in Louisiana that told the story about the screwdriver. But, I mean, she wasn't going to buy Medison anyway. Q. Well, she told the Medison story, right? A. Right. But, I mean, it was - her reaction was that, you know, they weren't going to even consider them because it was so bad — the service was so bad. Q. Anybody else? A. I didn't talk to people about their reactions to the Medison story. [*See* Little Dep., p. 110, SJ Exhibit 11]		
33.	Finally, Ms. Little's never heard Defendant Greg Reed make disparaging	33.	C. Martin Aff., Dkt. Entry 31, p 50 Q. Have you ever seen a

	statements about the Plaintiff. She testified. Q: Have you ever heard Gregg Reed make any disparaging statement about Medison? A. No. Q. Did you tell Mr. DePalma that? A. I don't think that he and I discussed anything specific. It was general, what we talked about was general. [*See* Little Dep., p. 110, SJ Exhibit 11].		Medison ultrasound machine A: I saw one in the doctor's office where my daughter went, and I saw one in the Shreveport office Q: What are you talking about in the office where your daughter went? A: My daughter called me last week..... **remainder of quote** C. Martin Aff. Dkt. Entry 31, p.41-43 Q: Was that used in the sales presentation's concerning the 3D and 4D equipment? **(article on Aunt Minnie)** A: In the very beginning, he [Kirk] wouldn't bring that out. If Medison came up, he would always talk about their service issues and their poor image quality on the 2D probes. Before Medison came in, Kirk had to present the story, before Medison could get its foot in the door, because Medison equipment is going to be much cheaper than what GE sells it for, or

			less than what Kirk would sell it. Kirk knew that if Medison ever got its foot in the door, GE was going to be blown out of the\ water Q: Did Kirk use it on that demo? A: If he did, it would have been when I was in the room. I didn't hear it. It's when he would have gone to the office and spoke to the doctor or office manager, and I would still be doing the work. I do know that he used it on occasion, but I can't tell you exactly when. I do know he used it before Q: When Kirk used the bankruptcy sorry, what was he using it to convey about Medison? A: That Medison was financially going under Q: How would that be a part of the presentation? A: He would discredit Medison. He would challenge a doctor with: why would you invest in a company that the equipment has gone under? They are going bankrupt. he wouldn't put it that way—he

			would say. "this is your decision to make, I can just give information I have. I can just tell you what I know, then it is up to you to make your own decision." Kirk put it in that way for the doctor to decide; Kirk was appearing to give the doctor all the information for the doctor to make hi own decision, but, if the doctor believed what Kirk said, only a fool would buy Medison. Q. Did Kirk say anything about services or the service? A: Always. Every time, If we were against Medison, always, the service came up. Every time. I know that. C. Martin Aff. Dkt. Entry 31, p 58 Q. From your experience with the doctors who were told by Kirk that Medison was in bankruptcy or going bankrupt, did they react in a way so they communicate to you, by whatever words or

			expressions or gestures (such thanking Kirk for telling them or laughing or putting their hands on their head to any other way of conveying a message), what they took Kirk to mean by "bankrupt" or "bankruptcy?" A: Yes. I don't just think, I knew how the doctors took what Kirk said by "bankrupt and bankruptcy," I know they took it the same way I did. (previously stated on the same page-That Medison is a company that is about to go under, because it doesn't have the financial stability to live up to its promises)
34.	Plaintiffs witness Cheryl Martin is a former applications technician who worked for GE and Preferred Medical on a contract basis from time to time. *[See* Affidavit of Cheryl Martin, executed on January 31, 2006, ("Martin Aff.") pp. 14, 15, 37, 38. A copy of the entire	34.	Undisputed but incomplete because C. Martin, for a period of time, was a full time employee of Preferred. C. Martin Aff. (Dkt. Entry 31, p. 18)

	affidavit was filed by Plaintiff on or about August 25, 2006, Dkt. No. 31. Portions of the Martin Aff. cited herein are attached collectively as S.J. Exhibit 13]		
35.	Ms. Martin only testified about one specific incident involving Medison and a potential purchaser. The incident involved a doctor in Alabama and allegedly occurred in the Fall of 2003. At the time, Martin was not working for Preferred Medical and was only in the doctor's office for purely personal reasons. Ms. Martin had accompanied her daughter who was pregnant at the time to her daughter's doctor's office for an ultrasound. Her testimony about the incident is as follows: CLM: My daughter called me last week and told me that her doctor—I don't	35.	The evidentiary significance relates to the proposition that physicians, when provided information that Plaintiff is in bankruptcy, react negatively against Plaintiff without need for any additional information and irrespective of the quality of Plaintiff's product.

	know his first name, but the office is Brown McCool in Fairhope, Alabama just purchased a Voluson. The doctor had Medison before. I thought when she was pregnant the first time, in 2003, I went there, in the fall of that year, and I went with her for her ultrasound. The girl started the scan, and I thought: how did she get a Medison? They had just gotten it. I feel horrible telling you this, but I said: "Did you know that they were in bankruptcy?" She said, "No!" And what I heard from my daughter last week that they pulled that Medison and that GE now has a Voluson in there. My daughter will be the first patient		

	that the doctors use the Voluson on this week or next. [*See* Martin Aff, p. 52, SJ Exhibit 3].		
36.	The Plaintiffs corporate representative admitted that Plaintiff has received complaints from its customers. The corporate representative stated: Q. When was the last time you talked to Mr. Ghilduyal about the frequency of complaints that he gets from customers? A. We have one situation in Missouri that's going on right now, but it's the only one that I know in quite some time. [Medison Dep., p. 174, S.J. Exhibit 3]	36.	R. DePalma Depo Dkt. Entry 119, p.174 A: When you say, more regularly, I don't know what that means specifically because it happens infrequently.... R. DePalma Depo Dkt. Entry 119, p.180 Q: Let's focus on what actually has occurred. The customer satisfaction survey, is that what you called it? A: Yes Q: That has been sent out since 2006? A: Yeah. One time in 2006 Q: Did that include questions about service and support? A: Yes, I believe it did Q: Did you get about 15% of those back? A: I don't think we did. I think it was close to 8 % or 9%

			Q: And what were the results of those 8 or 9%? A: I believe the customer satisfaction was in the 87 to 88% range Q: How about the satisfaction with their service and/or support? A: That was what I was speaking to
37.	At least one of these complaints, as Plaintiff admits in the Amended Complaint, ripened into a lawsuit against Plaintiff in Alabama. In May 2003, the Plaintiff was sued in a case styled ***George V. Seir, DVM, et at. v Medison America, Inc.***, No. 02-087-B (Circuit Court Autauga County, Alabama). The suit alleged among other things that Medison America "negligently repaired the equipment or negligently failed to repair the equipment on numerous occasions." As of the commencement of the present action, this	37.	R. DePalma Depo Dkt. Entry 119, pp. 224-226 Q. I'll pass you document Number 19, which is in order, Medison 0014 through Medison 0023. A. Yes. Q. This was produced by you, correct? A. Yes. Q. In the discovery, is what I mean? A. Yes. Q. This appears to be a settlement agreement of some type of legal dispute involving Medison America, Inc. as the defendant, correct? A. Yes. Q. What was the subject matter of the litigation? A. The purchaser

	lawsuit in Alabama was pending and unresolved. [*See* Amended Complaint ¶¶ 65-71.]		purchased a piece of equipment that he was told would make him X number of dollars per year from a dealer. The dealer claimed that he hadn't used the teleradiology system the way he had to to [sic] generate his funds. And the veterinarian, Dr. George Seier, sued quite few people. Q. And it would be fair to say that Dr. Seier was not a satisfied customer; is that correct? *** Q. Do you think that Dr. Seier was a satisfied customer? A. I think that all of Dr. Seier's requests had been fulfilled. He did not get the dollars he expected to make with the system that he bought. Q. And despite the fact that you thought that, Medison America agreed to pay him $10,000 in order to settle this matter? *** A. This is true.

			Q. He was a director -- he was a -- what is he? A veterinarian? A. Veterinarian. Q. What was he being sold ultrasound equipment for? A. Veterinarian business and ultrasound in the U.S. is upwards of a 100 million dollars. Q. Was the distributor involved here, BioCore? A. No. Q. Who was the distributor involved? A. It was RVC, Remote Veterinary Corporation, I believe.
38.	Plaintiff has admitted that Defendants have not exercised dominion and control any property of the Plaintiff. [Medison Dep. pp. 252-253, S.J. Exhibit 3]	38.	Testimony inadmissible because asks for a legal conclusion. Dominion and control over an intangible or inchoate right or entitlement could not reasonably be expected to be understood by a non-lawyer as "property" as put by the question.
39.	Plaintiff has admitted that Defendants have not interfered with any contracts Plaintiff may have with third parties. [Medison Dep.	39.	Testimony inadmissible because asks for a legal conclusion. An interference with an intangible or inchoate right or entitlement

	pp. 253-254, S.J. Exhibit 3]		could not reasonably be expected to be understood by a non-lawyer as "contract" as put by the question.

Respectfully submitted,

LARRY E. PARRISH, P.C.

By: /s/Larry E. Parrish
Larry E. Parrish, BPR#8464
The Crescent Center
6075 Poplar Avenue, Suite 420
Memphis, Tennessee 38119
(901) 767-8000
parrish@parrishandshaw.com

* * *

[Certificate of Service omitted from printing of this appendix]

168

(2)

Supreme Court, U.S.
FILED
AUG 5 - 2010
OFFICE OF THE CLERK

No. 09-1372

In the Supreme Court of the United States

MEDISON AMERICA, INC.,
Petitioner,

v.

PREFERRED MEDICAL SYSTEMS, LLC, JERRY KIRK McGUIRE and GREG REED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

John J. Cook
Counsel of Record
Pietrangelo Cook PLC
6410 Poplar Avenue
Suite 190
Memphis, Tennessee 38119
(901) 685-2662
jcook@pcplc.com

Counsel for Respondents

August 5, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Because the Respondents believe that the Petitioner did not properly state the questions raised, Respondents have re-ordered and re-stated the questions as follows:

I. Whether the decision of the District Court conflicts with this Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) or with the decision of the other court of appeals relied upon by Petitioner.

II. Whether the District Court, which had jurisdiction based both on a federal question and on diversity, erred by using the federal standard for summary judgment instead of the Tennessee standard.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Preferred Medical Systems, LLC states that it has not issued shares to the public, that it has no parent company and that it has no affiliates, parent companies or subsidiaries that have issued shares to the public.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

I. Procedural History 1

II. Facts Relevant to Petition 4

III. The Opinions Below 8

SUMMARY OF ARGUMENT 9

ARGUMENT-REASONS FOR DENYING PETITION 12

I. The decision of the District Court does not conflict with this Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) or with the decision of the other courts of appeals cited by Petitioner. 12

A. Under *Celotex*, the summary judgment movant who does not bear the burden of proof at trial must nevertheless point out to the district court that there is an absence of evidence to support the nonmoving party's case. 13

B. The District Court properly allocated the initial burden on the Defendants in accord with the summary judgment principles described in *Celotex*. 14

1. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). 16

2. The summary judgment standard utilized by the District Court under W.D. Tenn. Local Rule 7.2(d) is the same as the standard described in *Celotex* and *Clark*. 18

3. The District Court's decision is consistent with *Celotex* and *Clark*. 19

(a) *Patterson's Testimony*. 21

(b) *Harris' Testimony*. 22

(c) *Little's Testimony* 22

(d) *Martin's Affidavit*. 28

(e) *Dr. Sigman's Affidavit* 28

(f) *Barton's Affidavit* 29

(g) *Therber's Affidavit*. 29

(h) *Austin's Affidavit* 30

C. There is no conflict between the burden imposed by the Eleventh Circuit and the Sixth Circuit. 31

II. The District Court, which had jurisdiction based both on a federal question and on diversity, did not err by using the federal standard for summary judgment instead of the Tennessee standard. 32

CONCLUSION 39

APPENDIX

Appendix A: Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment, In the United States District Court for the Western District of Tennessee Western Division (July 10, 2007) . 1b

TABLE OF AUTHORITIES

CASES

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 14

Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Bd. of Podiatric Surgery, Inc.,
185 F.3d 606 (6th Cir. 1999) 24

Baranowski v. Hart,
486 F.3d 112 (5th Cir. 2007), *cert. denied*,
128 S. Ct. 707, 169 L. Ed. 2d 553 (2007) 36

Byrd v. Blue Ridge,
356 U.S. 525 (1958) 35

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) ..... *passim*

Clark v. Coats & Clark, Inc.,
929 F.2d 604 (11th Cir. 1991) ..... *passim*

Devonshire v. Johnston Group First Advisors,
166 Fed.Appx. 811, 2006 WL 172233 (6th Cir. 2006) 38

Doe v. Doe,
941 F.2d 280 (5th Cir. 1991) 33

Fidelity & Deposit Co. of Maryland v. United States,
187 U.S. 315 (1902) 36

GBJ Corp. v. Eastern Ohio Paving Co.,
139 F.3d 1080 (6th Cir. 1998) 31

Hanna v. Plumer,
380 U.S. 460 (1965) 11, 12, 33

Hannan v. Alltel Publ'g Co.,
270 S.W.3d 1 (Tenn. 2008) 32, 36, 37

Helms v. Zubaty,
495 F.3d 252 (6th Cir. 2007) 31

Lavin v. New York News, Inc.,
757 F.2d 1416 (3d Cir. 1985) 34

Leadbetter v. Gilley,
385 F.3d 683 (6th Cir. 2004) 31

Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.,
709 F.2d 427 (6th Cir. 1983) 34

McEwen v. Delta Air Lines, Inc.,
919 F.2d 58 (7th Cir. 1990) 33

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
130 S. Ct. 1431 (2010) 35, 38

Stickley v. State Farm Mut. Auto. Ins. Co.,
505 F.3d 1070 (10th Cir. 2007) 33

Street v. J.C. Bradford & Co.,
886 F.2d 1472 (6th Cir. 1989) 32

Sullivan v. Massachusetts Mut. Life Ins. Co.,
611 F.2d 261 (9th Cir. 1979) 34

Thompson v. Williamson County, Tennessee,
219 F.3d 555 (6th Cir. 2000) 31

STATUTES

15 U.S.C. § 1125(a)(1)(B) (2007) 20

RULES

W.D. Tenn. Local Rule 7.2(d) 10, 18

Fed. R. Civ. P. 56 ..... *passim*

Tenn. R. Civ. P. 56 ..... *passim*

STATEMENT OF THE CASE

The Petitioner's Statement of the Case omits important items from the procedural history and from the facts relevant to the Petition. Respondents therefore submit their own Statement of the Case.

I. Procedural History.

The Petitioner Medison America, Inc. ("Medison") sells ultrasound equipment in the United States which is manufactured by Medison, Ltd., a Korean Company. Medison is wholly owned by Medison, Ltd. General Electric Company ("GE") manufactures ultrasound equipment that competes with Medison ultrasound equipment. Defendant Preferred Medical Systems, LLC ("Preferred Medical") is an independent representative for GE. Defendants McGuire and Reed work for Preferred Medical.

On May 26, 2005, Medison filed the Complaint in the District Court. The Complaint contains claims under the federal Lanham Act, along with state law claims, and seeks damages of $18 million, in addition to other relief.

Medison's claims arise from statements allegedly made by Defendants that Medison was in bankruptcy and/or having financial difficulties and that Medison did not support and had problems servicing ultrasound equipment.

During the two years that the case was pending, the parties conducted extensive discovery.

On July 10, 2007, Defendants filed a Motion for Summary Judgment on all claims. On the same date, the Defendants filed a supporting memorandum, statement of undisputed material facts and the relevant portions of the record relied upon by the Defendants in support of the motion. In their Motion, the Defendants maintained that the testimony from Medison's witnesses was either inadmissible hearsay, failed to show that the alleged statements were false or misleading, or failed to create a genuine issue on another essential element of Medison's claims.

The precise portions of the record filed with, and in support of, the Defendants' Motion for Summary Judgment included the following:

Declaration of Kirk McGuire

Deposition Transcript of Medison's corporate representative Robert DePalma

Medison's Response's to Requests for Admission

Korean Company Reorganization Act

Medison's Rule 26 Disclosures

Declaration of Greg Reed

Medison's Response to Interrogatories

Deposition Transcript of Mark Patterson

Deposition Transcript of Martin Harris

Deposition Transcript of Mary Margaret Little

Affidavit of Mary Margaret Little

Affidavit of Cheryl Martin

Deposition Transcript of David Ciscel

Deposition Transcript of Dr. Marla Stafford

The Petitioner in its Statement of the Case erroneously states that Defendants only filed a single affidavit in support of the Motion for Summary Judgment. (Pet. 2). Petitioner simply ignores the substantial amount of materials that Defendants did in fact file and which were referred to in the Defendants' Motion for Summary judgment as described above.[1]

Medison filed a response to the motion for summary judgment, along with complete copies of the deposition transcripts referred to above and affidavits from four additional witnesses.

On August 31, 2007, Defendants filed a reply memorandum, and on September 11, 2007 Medison filed a Sur-Reply memorandum.

On November 16, 2007, the District Court entered summary judgment in favor of the Defendants on all counts.

On December 11, 2007, Medison filed its Notice of Appeal of the District Court's Summary Judgment.

On December 18, 2009, the Sixth Circuit rendered an opinion affirming the District Court's decision.

---

[1] The various materials which Defendants filed with the Motion were attached to and referenced in the Defendants' Statement of Undisputed Material Facts, a copy of which is attached hereto. (Resp. App. 1b).

On February 9, 2010, the Sixth Circuit denied Medison's petition for rehearing en banc.

II. Facts Relevant to the Petition.

Medison is a California corporation wholly owned by Medison, Ltd., a Korean company. Medison, Ltd. manufactures ultrasound equipment which is sold by Medison in the United States.

Defendant Preferred Medical is an independent sales representative for GE in the sale of ultrasound equipment.

As noted above, Medison's Complaint alleged that Defendants made statements to potential customers to the effect that Medison was in bankruptcy and/or having financial difficulties and that Medison did not support and had problems servicing its ultrasound equipment.

In January 2002, prior to the commencement of this lawsuit, Medison, Ltd. entered into a receivership procedure in Korea. (Pet. App. 18a).

In a memorandum to Medison, the Korean legal counsel for Medison, Ltd. stated that the reorganization proceedings in Korea were similar to Chapter 11 bankruptcy proceedings in the United States. Medison's auditors described Medison, Ltd.'s proceedings as a "bankruptcy" in Medison's financial statements. (Pet. App. 18a-19a).

In 2003, according to its audited financial statements, Medison's liabilities exceeded its assets by

$25,845,091, and in 2004 Medison's liabilities exceeded its assets by $24,671,941. (Pet. App. 19a).

Medison has only two service and support personnel in the United States, both of whom reside in California. If a service issue arises, the independent dealer who sold the equipment hires an independent contractor to address the issue. (Pet. App. 18a, 33a).

Medison has received customer complaints. A customer complaint ripened into a lawsuit against Medison in May 2003. The suit alleged that Medison "negligently repaired the equipment or negligently failed to repair the equipment on numerous occasions." (Pet. App. 22a-23a).

Medison's Complaint and Medison's Rule 26 Disclosures list prospective customers that Medison contends did not purchase its product because of the alleged disparaging statements (the "Prospective Customers"). None of the Prospective Customers had owned Medison equipment prior to the time of the alleged statements. (Pet. App. 19a-20a).

In response to interrogatories, Medison stated that the information in the Complaint came "exclusively from" Mark Patterson, Mary Margaret Little, and Cheryl Martin. Medison added Martin Harris to this list during its Rule 30(b)(6) deposition. (Pet. App. 20a).

In its response to the motion for summary judgment, Medison identified these additional witnesses: Dr. Robert Sigman, Myra Therber, Carol Barton and Dr. Joseph Austin. (Pet. App. 28a).

Patterson worked with a Medison distributor. Patterson testified about statements allegedly made by Defendants. However, Patterson testified that he was not actually present at the time the alleged statements were made. (Pet. App. 29a).

Harris, who owns a Medison distributor, testified about statements allegedly made by Defendants. Like Patterson, Harris testified that he did not actually hear any of the Defendants make the alleged statements. (Pet. App. 30a).

Little is a former employee of Preferred Medical. Little's employment with Preferred Medical was terminated on July 27, 2004. (Pet. App. 21a).

Little testified that while working for Preferred Medical she made statements about Medison, but when asked during her deposition Little could not identify the name of any customer to whom such statements were allegedly made. (Pet. App. 30a-31a).

Little testified Preferred Medical employees Scott Martin and Kim Wilson also made statements about Medison, but when asked during her deposition Little could not identify any of the customers who allegedly heard the statements. (Pet. App. 21a).

Little identified two specific customers to whom McGuire allegedly made statements, but Little testified that she did not actually hear the statements. (Pet. App. 21a, 35a-36a).

The only other customer Little mentions is in her affidavit---an OB practice in New Albany, Mississippi. However, Little testified that this customer's decision

to purchase a GE product, rather than a Medison, was based upon negative information the customer received from another Medison customer, not on information from Preferred Medical. (Pet. App. 22a).

Little did not speak to any potential purchasers about their reactions to the alleged statements. (Pet. App. 22a).

Little has never heard defendant Reed make disparaging statements about Medison. (Pet. App. 22a).

Cheryl Martin is a former technician who worked for Preferred Medical. Martin testified about a single incident involving her own statement about Medison's bankruptcy to a health care provider in 2003. At the time, however, Martin was not working for the Preferred Medical and was in the doctor's office for personal reasons. She was accompanying her daughter, who was pregnant. (Pet. App. 22a).

Dr. Sigman testified that he heard the alleged statements. However, Dr. Sigman did not testify that he believed the statements or that the statements caused him not to purchase a Medison product. In fact, Dr. Sigman testified that the statements caused him to not purchase a product from Preferred Medical. (Pet. App. 37a-38a).

Dr. Austin testified that he heard the alleged statements. However, Dr. Austin did not testify that the statements caused him not to purchase a Medison product. In fact, Dr. Austin purchased a Medison ultrasound product. (Pet. App. 39a).

Another Medison witness, Carol Barton, testified to one particular instance of the alleged statements, but Barton did not hear the statements herself. (Pet. App. 38a).

Medison witness Myra Therber testified that Defendants made statements that Medison was having bankruptcy problems. Therber's affidavit did not state the basis for her knowledge. Because Therber did not work with the defendants or prospective customer, the District Court found that the context and content of Therber's testimony did not support an inference that it was based upon personal knowledge. (Pet. App. 38a-39a).

III. The Opinions Below

The District Court granted the Defendants' Motion for Summary Judgment on all counts. The District Court reviewed each item of the extensive evidence identified by the Defendants, together with the other materials filed by Medison with its Response. The District Court found that the Defendants were entitled to summary judgment because the testimony from Medison's witnesses was either inadmissible hearsay, failed to show that the alleged statements were false or misleading, or failed to create a genuine issue on another essential element of Medison's claims. (Pet. App. 15a-52a)

The Sixth Circuit affirmed the District Court's decision. (Pet. App. 1a).

SUMMARY OF ARGUMENT

This case does not warrant review.

Contrary to the Petitioner's assertions, the District Court's decision does not conflict with this Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) ("Celotex"), or with the decision of the other court of appeals relied upon by Petitioner.

In *Celotex*, this Court held that when the non-moving party bears the burden of proof at trial, the moving party need not support its motion with affidavits or other similar material negating the opponent's claim, in order to discharge this initial responsibility. Instead, the moving party simply may show--that is, point out to the district court--that there is an absence of evidence to support the nonmoving party's case. *Id.* at 323-325.

In *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991), the case cited by the Petitioner as the conflicting decision, the Eleventh Circuit stated that "the movant may meet its Rule 56 burden without negating an element of the nonmoving party's claim and that under such circumstances it is sufficient to point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden. Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Clark*, 929 F.2d at 608.

The Petitioner contends that the District Court deviated from the standard of *Celotex* and *Clark* because the Defendants (according to Petitioner)

merely "suggested" that there was an absence of proof rather than actually pointing to and showing the District Court the evidence in the record demonstrating that Medison would not be able to prove its case. (Pet. 33).

The Petitioner's argument is without merit. The District Court's decision is consistent with *Celotex* and *Clark*. Under the local rules applicable to the District Court, a movant may not merely "suggest" that the nonmovant cannot prove its case, but instead must identify and submit evidentiary materials in support of such an assertion. *See* W.D.Tenn. Local Rule 7.2(d).

Further, the Petitioner has mischaracterized the summary judgment motion and ignores the specific and extensive portions of the record relied upon by the District Court in granting the motion. The motion did not merely "suggest" that Medison could not prove its case, but also included specific portions of the record (including Medison's responses to interrogatories and requests for admissions, Medison's Rule 26 disclosures, affidavits and deposition transcripts of Medison's witnesses, and Medison's own documentation) and demonstrated why such materials showed that there was no genuine dispute about a material fact.

The Defendants sought summary judgment on Medison's Lanham Act, defamation and other state law claims. The motion and the referenced materials demonstrated that that the testimony from the witnesses identified by Medison was either inadmissible hearsay, failed to show that the alleged statements were false or misleading, or failed to create a genuine issue on another essential element of Medison's claims.

Based upon the Defendants' motion and the materials in the record, the District Court concluded that there was no genuine issue of material fact and that the Defendants were entitled to a judgment as a matter of law.

Much of the Petition attempts to describe a conflict or ambiguity in the way other courts (both in and outside the Sixth Circuit) in other cases may have interpreted and applied the summary judgment principles of *Celotex*. Regardless of whether there may be ambiguities or conflicts among any other cases, this particular case is easily harmonized with *Celotex*, as well as the Eleventh Circuit's decision in *Clark*. This case is therefore not the vehicle to resolve any such conflict or ambiguity, and a writ of certiorari should not be granted.[2]

The Petitioner's alternative grounds for review are similarly without merit. Petitioner maintains that the District Court should have used the Tennessee standard for summary judgment instead of the federal standard.

This Court has long held that in diversity actions "federal courts are to apply state substantive law and federal procedural law." *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). Where the source of the federal rule is the Federal Rules of Civil Procedure the decisive question is whether the rule governs a matter "which, though falling within the uncertain area between

---

[2] As illustrated below in Section I.C. of "Reasons for Denying the Petition", there really is no conflict between the Sixth Circuit and the Eleventh Circuit.

substance and procedure, [is] rationally capable of classification as either," *id.* at 472. If the subject matter of the federal rule is "arguably procedural" *id.* at 476 (Harlan, J., concurring), then the rule does not overstep the Rules Enabling Act and is therefore to be followed. *Id.* at 471.

Further federal rules purporting to govern procedural matters, which are duly passed by Congress, shall be presumed constitutionally valid unless they cannot rationally be characterized as rules of procedure. *See Hanna,* 380 U.S. at 471.

Courts universally have found that the federal rules for summary judgment are procedural and therefore applicable in diversity actions rather than the state summary judgment rules. Petitioner cites no authority to the contrary. Accordingly, the District Court did not err by using the federal standard for summary judgment, so a writ of certiorari should not be granted.

ARGUMENT - REASONS FOR DENYING THE PETITION

I. The decision of the District Court does not conflict with this Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) or with the decision of the other courts of appeals cited by Petitioner.

This case does not warrant review. Contrary to the Petitioner's assertions, the District Court's decision does not conflict with this Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986), or with the

decision of the other court of appeals relied upon by Petitioner.

The Petitioner's argument for a writ of certiorari gives very little consideration to the actual details of the District Court's decision in this case. Instead, the bulk of the Petition attempts to describe a conflict or ambiguity in the way other courts (both in and outside the Sixth Circuit) in other cases may have interpreted and applied the summary judgment principles of *Celotex*. Regardless of whether there may ambiguities or conflicts among any other cases, this particular case is easily harmonized with this Court's decision in *Celotex*, as well as the decision of the other court of appeals relied upon by Petitioner. This case is therefore not the vehicle to resolve any such conflict or ambiguity, and a writ of certiorari should not be granted.

A. Under *Celotex*, the summary judgment movant who does not bear the burden of proof at trial must nevertheless point out to the district court that there is an absence of evidence to support the nonmoving party's case.

In *Celotex*, this Court held that when, as in the present case, the non-moving party bears the burden of proof on an issue at trial, the moving party need not "support its motion with affidavits or other similar material negating the opponent's claim," *Id.* at 323, in order to discharge this initial responsibility. Instead, the moving party simply may " 'show[ ]'--that is, point[ ] out to the district court--that there is an absence of evidence to support the nonmoving party's case." *Id.* at

325 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970)).

Justice White, who joined the majority in the *Celotex* decision, added a separate concurring opinion, stating:

> I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

447 U.S. at 328 (White, J. concurring).

B. The District Court properly allocated the initial burden on the Defendants in accord with the summary judgment principles described in *Celotex*.

The District Court in this case properly allocated the initial burden on Defendants in accord with the summary judgment principles described in *Celotex*. The Petitioner is contending to the contrary-----that the District Court deviated from the standard of *Celotex* because the Defendants (according to

Petitioner) merely "suggested" that there was an absence of proof rather than actually pointing to and showing the District Court the evidence in the record demonstrating that Medison would not be able to prove its case. (Pet. 33).

The Petitioner's argument is without merit and ignores the record in this case.

The District Court's decision is consistent with the standard described in *Celotex*, including Justice White's statements in the concurring opinion. As illustrated below, the Petitioner has mischaracterized the Defendants' summary judgment motion and ignores the specific and extensive portions of the record relied upon by the District Court.

After the completion of two years of discovery, Defendants moved for summary judgment. The Motion did not merely "suggest" that Medison could not prove its case, but also included specific portions of the record (including Medison's responses to interrogatories and requests for admissions, Medison's Rule 26 disclosures, affidavits and deposition transcripts of Medison's witnesses, and Medison's own documentation) and demonstrated why such materials showed that the testimony from the witnesses identified by Medison was either inadmissible hearsay, failed to show that the alleged statements were false or misleading, or failed to create a genuine issue on another essential element of Medison's claims. (Pet. App. 28a-42a).

Based upon the Motion and the materials in the record, the District Court concluded that there was no genuine issue of material fact and that the Defendants

were entitled to a judgment as a matter of law. (Pet. App. 52a)

1. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991).

The Petitioner relies on the Eleventh Circuit decision in *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991) to show that the decision in the present case conflicts with *Celotex*. (Pet. 22-24). A review of the *Clark* decision along with the District Court's decision reveals that the Petitioner's reliance is misplaced.

In *Clark*, the Eleventh Circuit opined on the summary judgment standard as described in *Celotex* and in particular on the burden placed upon the moving party.

> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment. *Celotex* did not change the general rule. ***Celotex* simply holds that under certain circumstances the movant may meet its Rule 56 burden without negating an element of the non-moving party's claim and that under such circumstances it is sufficient to point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to**

> **meet that burden. Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial.**

Clark, 929 F.2d at 608 (emphasis added).

Thus, the Eleventh Circuit held that the movant must do more than simply state or suggest that the non-moving party cannot meet its burden at trial. The movant must "point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden." *Id.*

The Eleventh Circuit explained how the movant in *Celotex* satisfied its initial burden.

> Celotex met its burden by noting that Catrett "had failed to identify, in answering interrogatories specifically requesting such information, any witness who could testify about the decedent's exposure to [Celotex's] asbestos products." *Id.* at 320. The Court's inquiry did not end there, however. By meeting its burden, Celotex merely shifted the burden to Catrett to point to other portions of the record that would show that there was indeed a genuine issue of fact regarding the causation issue. The Court's conclusion that Celotex had met its burden under these circumstances is understandable. To have required a trial when it was clear from the materials in the record that Catrett could not prove her claim would have been a waste of time and resources, and

> would have unnecessarily restricted the proper use of summary judgment.

929 F.2d at 607-608.

According to this Court and the Eleventh Circuit, a movant can satisfy its initial burden by pointing to answers to interrogatories which confirm that the non-movant has no witness to support an essential element of its claim. The movant thereby shifts the burden to the non-movant to show that there is a genuine issue.

2. The summary judgment standard utilized by the District Court under W.D. Tenn. Local Rule 7.2(d) is the same as the standard described in *Celotex* and *Clark*.

The initial burden placed by the District Court upon the movants in the present case is the same as the one described in *Celotex* and in *Clark*. Indeed, the local summary judgment rule applicable to the District Court in this case is virtually identical to the standard described in *Clark* and *Celotex*

> If the proponent contends that the opponent of the motion cannot produce evidence to create a genuine issue of material fact, the proponent shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of this assertion.

W.D. Tenn. Local Rule 7.2(d).

Therefore, contrary to the Petitioner's contention, the District Court did not simply allow the Defendants to state or "suggest" that Medison could not prove its

case. Rather, the Defendants were required to point to and file precise portions of the record which demonstrated that Medison would not be able to meet its burden of proof at trial.

3. The District Court's decision is consistent with *Celotex* and *Clark*.

A review of the District Court's decision reveals that it is in conformity with *Celotex* and *Clark*. The District Court expressly cited *Celotex*:

> The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact at issue in the case...This may be accomplished by pointing out to the court that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

(Pet. App. 25a).

The Defendants satisfied the initial burden by identifying relevant parts of the record, filing them with the District Court and demonstrating why Medison would not be able to satisfy its burden at trial. The motion is replete with references to specific materials on file that demonstrated that Medison would not be able to satisfy its burden at trial. Such materials included the Complaint, Medison's responses to interrogatories and requests for admission, deposition and affidavit testimony from Medison's witnesses, Medison's Rule 26 disclosures, and Medison's own documents obtained in the course of discovery, all of which were referenced in and attached

to Defendants' Statement of Undisputed Material Facts. (Resp. App. 1b).

Contrary to Petitioner's contention, the District Court did not rely on the Defendants' mere "suggestion" that Medison could not prove its case. The District Court's 41-page opinion carefully analyzes testimony and other portions of the record in order to determine whether there was a genuine issue of material fact for each of Medison's asserted causes of action. (Pet. App. 29a-39a).

The District Court's analysis begins with Medison's Complaint, which alleged that the Defendants had made certain disparaging statements to potential purchasers of Medison's ultrasound products. The Complaint and Medison's Rule 26 Disclosures listed prospective customers that Medison contended did not purchase its product because of the alleged disparaging statements. Together, these documents identified the universe of customers to whom Medison alleged the defendants made disparaging statements about Medison and/or its products (referred to as the "Prospective Customers"). (Pet. App. 19a).

Medison asserted claims under the federal Lanham Act, as well as various state law causes of action. In order to succeed on its Lanham Act and other claims, Medison was required to show that Defendants made false or misleading statements of fact about Medison's products to the Prospective Customers. *See e.g.* 15 U.S.C. § 1125(a)(1)(B) (2007). (Pet. App. 27a).

In their Motion for Summary Judgment, like the movant in *Celotex*, the Defendants referred to Medison's response to interrogatories wherein Medison

stated that the information in the complaint came "exclusively from" Mark Patterson, Mary Margaret Little, and Cheryl Martin. Medison added Martin Harris during its deposition. (Pet. App. 20a). Additionally, in response to the Motion, Medison submitted affidavit testimony from Dr. Sigman, Carl Barton, Myra Therber, and Dr. Austin. (Pet. App. 28a).

In their Motion, Defendants maintained that the testimony from Medison's witnesses was either inadmissible hearsay, failed to show that the alleged statements were false or misleading, or failed to create a genuine issue on another essential element of Medison's claims. (Pet. App. 24a). To support this assertion, Defendants pointed to and filed precise portions of the record relied upon as evidence of this assertion, all of which were attached to and referenced in Defendants' Statement of Undisputed Material Facts. (Resp. App. 1b).

The District Court reviewed each item to determine whether summary judgment was appropriate. The following is a description of the testimony and other evidence supporting the motion for summary judgment.

(a) *Patterson's Testimony.*

Patterson worked for a Medison distributor. During his deposition, Patterson testified about statements that were allegedly made by the Defendants. Patterson admitted, however, that he was not present when the statements were made, and that all of his information about the allegedly disparaging statements was obtained from third parties. He also testified that he did not have any documents that

contained the disparaging statements allegedly made by the Defendants. (Pet. App. 29a).

The District Court noted that Patterson was testifying about his conversations with Prospective Customers and offering the statements made to him by the Prospective Customers for their truth, that is, that the Defendants made allegedly disparaging statements to the Prospective Customers. The District Court concluded that this testimony from Patterson represented a first level of hearsay that does not fall under any exception. Because Patterson's testimony was based on hearsay, the District Court properly did not consider it for purposes of summary judgment. (Pet. App. 30a).

(b) *Harris' Testimony.*

Harris also worked for a Medison distributor. Harris testified at his deposition about statements allegedly made by Defendants. Harris, however, like Patterson admitted that he was not present at the time the alleged statements were made and that he did not hear the Defendants make any of the alleged statements. Using the same analysis applied to Patterson, the District Court concluded that Harris' testimony was also based on hearsay. (Pet. App. 30a).

(c) *Little's Testimony*

Little was a former employee of Defendant Preferred Medical who testified that she made disparaging statements about Medison to some of the Prospective Customers while she was employed by Defendant. (Pet. App. 21a, 30a-31a).

In order to satisfy the first element of its Lanham Act claim, Medison was required to show that Little's statements were false or misleading statements of fact. The District Court found that many of the statements were not false or misleading based upon the portions of the record identified by Defendants. (Pet. App. 31a-33a).

More particularly, the statements described by Little included alleged comments by Little that Medison was bankrupt, on the brink of bankruptcy, or in bankruptcy proceedings.

These comments were actually proven to be true by Medison's own documents. Medison's Complaint stated that Medison, Ltd. had entered into a receivership in Korea under the Company Reorganization Act of Korea. (Pet. App. 18a). However, Medison alleged in the complaint that using the word "bankruptcy" to describe the Korean receivership was "false and misleading".

Documents produced by Medison proved otherwise. For example, in an internal memorandum Korean legal counsel for Medison, Ltd. stated that the receivership was similar to Chapter 11 bankruptcy proceedings in the United States. Additionally, Medison's own auditors in Medison's financial statements described Medison, Ltd.'s proceedings as a "bankruptcy." The District Court noted that other courts have also found the Company Reorganization Act of Korea to be substantially similar to United States Chapter 11 bankruptcy law. (Pet. App. 31a).

The District Court therefore concluded that it would not be literally false to say that Medison, Ltd.'s

Korean proceedings involve bankruptcy. Moreover, because Medison, Ltd. and Medison shared the same name, it was not literally false to say that "Medison" was involved in bankruptcy. (Pet. App. 31a).

Furthermore, it could not be considered true yet misleading to refer to Medison, Medison, Ltd., or both as being involved in bankruptcy. Medison, Ltd. wholly owned Medison and manufactured all the equipment that Medison sold. Any negative implications of bankruptcy on Medison, Ltd., such as drastic reorganization or even a closure of business, would have severe repercussions on Medison and its ability to do business. As a result, the District Court concluded that the alleged statements made by Little involving Medison's bankruptcy could not be considered false and misleading. (Pet. App. 31a-32a).

The District Court added that even if the statements were found to be true yet deceptive, Little testified that she did not speak to any potential purchaser about their reactions to the alleged statements. (Pet. App. 22a, 32a). This would preclude the statements from satisfying the requirements of a Lanham Act claim. If the statements are true, yet deceptive, or inherently ambiguous, then proof of actual deception must be produced before a violation can be established. (Pet. App. 28a *citing Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999)). A plaintiff relying on statements that are literally true yet misleading must show how customers actually reacted, not just how they could have reacted. *Id.* When questioned during her deposition, Little was unable to provide any testimony that showed how any Prospective Customers actually reacted to the

statements so her testimony was insufficient to create a genuine issue on this essential element. (Pet. App. 32a).

Little also testified that she made statements that Medison was financially unstable. The District Court found that such statements were true based upon Medison's own audited financial statements showing that Medison had multi-million dollar deficits in both 2003 and 2004, with liabilities exceeding its assets by more than $24 million each year. (Pet. App. 32a).

Little also testified that she said Medison was going out of business. The District Court found that this statement was a non-actionable opinion. As stated above, Lanham Act claims must be based on false or misleading statements of facts. The District Court concluded that when taken in context with the bankruptcy proceedings and financial instability, this statement was a mere prediction or opinion about the future of Medison, and consequently, was not actionable as a false or misleading statement of fact under the Lanham Act. (Pet. App. 33a).

Little testified that there were statements that Medison did not support or had problems servicing ultrasound equipment. When these statements were compared to the record, the District Court concluded that neither was literally false. Medison only employed two service agents, both of whom resided in California. Service for the equipment that might have been purchased by the Prospective Customers was the responsibility of the local dealer and not Medison. The District Court, however, concluded that the claim that Medison did not support its equipment could be true yet deceptive. Nevertheless, Little was unable to

provide any testimony as to how any Prospective Customers actually were deceived by or reacted to the claim that Medison did not provide support. Therefore, the District Court concluded that the statement did not satisfy a required element of a Lanham Act claim. (Pet. App. 33a-34a).

Similarly, the District Court found that Little's statements that Medison had problems servicing ultrasound equipment were not false or misleading statements of fact. Medison, as admitted by its corporate representative, did have complaints against it that related to its service of equipment, one of which ripened into a lawsuit. Therefore, stating that Medison had problems servicing equipment was not literally false. (Pet. App. 34a).

But the District Court concluded that the statement could be true yet deceptive. The statement could have deceived Prospective Customers into believing that Medison's service was substandard and inadequate, and that Medison had problems servicing all its equipment. (Pet. App. 34a).

Little, however, failed to provide any testimony that any Prospective Customers were actually deceived by this statement, so Little's testimony about the statement would be insufficient to satisfy a required element of a Lanham Act claim. (Pet. App. 34a).

Another defect in Little's testimony arose because, when questioned during her deposition, she was unable to specifically identify the names of any customers to whom she spoke, stating only that she told the "Medison Story" to every 3D or 4D customer who mentioned Medison. (Pet. App. 30a-31a).

Little testified that she heard Scott Martin and Kim Wilson tell the Medison Story to Prospective Customers. When asked, however, Little was unable to identify any of the people that Scott Martin or Kim Wilson were speaking to when she heard them telling the Medison Story. As a result, the District Court found that Little's testimony was insufficient to show that Mr. Martin or Ms. Wilson made such statements. (Pet. App. 35a).

One of the individual customers that Little was able to identify by name was Dr. Sigman, in Alabama, who allegedly was told the statements in the Medison Story by defendant Kirk McGuire. Little, nonetheless, was not present at the time McGuire allegedly spoke to Dr. Sigman. Little testified that McGuire told her that he had told the Medison Story to Dr. Sigman. Assuming that this testimony would be admissible non-hearsay, the District Court concluded that Little was still unable to testify about the effect of the statements on Dr. Sigman, which would be necessary to satisfy the elements of a Lanham Act claim. (Pet. App. 35a-36a).

Little identified Dr. Scott Smith as a person who had been told the Medison Story. In this instance, McGuire allegedly told Dr. Smith the Medison Story over Little's cell phone. Little was present with Dr. Smith while McGuire spoke with him over the phone. Little could not hear what McGuire told Dr. Smith, and she provided no testimony indicating that McGuire told her what he had told Dr. Smith. (Pet. App. 36a).

In summary, the District Court after a careful review of the materials in the record concluded that

Little's affidavit and deposition testimony was insufficient to establish the necessary elements of Medison's claims. (Pet. App. 36a).

(d) *Martin's Affidavit*.

Cheryl Martin, another former employee of Preferred Medical, testified about one time when she made a statement to a Prospective Customer about Medison being in bankruptcy. The District Court concluded that such a statement could not be considered false or misleading. Further, Martin was not working for Preferred Medical at the time, but was only in the doctor's office for personal reasons. Because she was not acting in the scope of employment, the District Court concluded that no statements she made could rightly be attributed to the Defendants. (Pet. App. 36a-37a).

(e) *Dr. Sigman's Affidavit*

Dr. Sigman, a Prospective Customer, testified that McGuire told him that Medison was financially unstable and bankrupt. As discussed above, neither statement is literally false when applied to Medison. Dr. Sigman testified that McGuire's statements gave him the impression that Medison "was or was on the verge of going out of business." The District Court found that this statement was not indicative of deception because the financial numbers for Medison, as previously discussed, suggested strong instability in the company, and thus, Dr. Sigman's impression did not indicate that he was actually deceived by McGuire's statements, a required element of a Lanham Act claim. (Pet. App. 37a-38a).

Dr. Sigman also testified that McGuire told him Medison could not provide service or maintenance and repair on its equipment. While technically true, as discussed above, this statement could have been deceptive. However, the District Court noted that there was no evidence that Dr. Sigman was actually deceived by the statements, a required element of the claims. In fact, Dr. Sigman testified that the statements caused him to not purchase from *Preferred Medical*. (Pet. App. 38a).

Further, as the Sixth Circuit noted, the affidavit did show that the Medison Story had harmed Medison, a required element of Medison's claims. (Pet. App. 9a).

(f) *Barton's Affidavit*

Another Medison identified witness, Carol Barton, testified to one instance of disparaging statements related to her by Joanne Pippin, a person who worked for a Prospective Customer. The District Court found the testimony to be insufficient because Barton's testimony was based on hearsay and could not be considered for summary judgment. (Pet. App. 38a).

(g) *Therber's Affidavit*.

Myra Therber testified that McGuire made statements to Dr. Drucker in Dalton, Georgia. Therber stated that McGuire told Dr. Drucker that Medison was having bankruptcy problems. The District Court found that such statements were not false or misleading statements of fact. Further, Therber's affidavit did not state the basis for her knowledge. The District Court found it impossible to tell from her testimony if she was present when the statements

were made or received the information from a third party. Because Therber did not work with McGuire, the context did not suggest that she would have been present when the statements were allegedly made. The District Court concluded that this created a high likelihood that her testimony was based on inadmissible hearsay and therefore disregarded the affidavit. (Pet. App. 38a-39a).

(h) *Austin's Affidavit*

Dr. Austin, a Prospective Customer, testified that McGuire made statements to him about Medison being in shaky financial condition and having trouble servicing its products. The District Court found that these statements were not literally false. Further, Dr. Austin provided no evidence to suggest that he was actually deceived by the statements. In fact, he purchased a Medison product. (Pet. App. 39a).

After carefully analyzing the affidavits, depositions and other materials in this case, the District Court found the admissible evidence was not sufficient to create a genuine issue of material fact as to whether false statements of fact were made by the Defendants or whether any other statements of fact actually deceived any of the Prospective Customers or harmed Medison. (Pet. App. 39a).

As illustrated above, the Defendants did not simply "suggest" that Medison could not prove its case. Both the motion and the District Court's decision were based upon an extensive analysis of the materials on file, all of which demonstrated that Medison would not be able to satisfy its burden at trial. The District Court's decision is consistent with the summary

judgment standard articulated in *Celotex* and *Clark*, and therefore the petition for a writ of certiorari should be denied.

C. There is no conflict between the burden imposed by the Eleventh Circuit and the Sixth Circuit.

Although not relevant in this particular case, it is worth noting that there really is no conflict between the burden imposed by the Eleventh Circuit and the Sixth Circuit. The Sixth Circuit in *GBJ Corp. v. Eastern Ohio Paving Co.*, citing *Celotex*, stated that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." 139 F.3d 1080, 1089 (6th Cir. 1998).

The Petitioner's contention that the Sixth Circuit allows the movant for summary judgment to merely "suggest" that the plaintiff has no evidence to prove his case, without identifying portions of the record in support of the assertion, is without any basis. *See e.g. Helms v. Zubaty*, 495 F.3d 252, 255 (6th Cir. 2007) ("'The moving party has the burden of identifying which portions of the record before the court demonstrate the absence of a genuine issue of material fact."); *Leadbetter v. Gilley*, 385 F.3d 683, 689 (6th Cir. 2004) ("The party that seeks summary judgment bears the initial burden of specifying the basis upon which it contends judgment should be granted and of identifying that portion of the record which, in its opinion, demonstrates the absence of a genuine issue of material fact."); *Thompson v. Williamson County*,

Tennessee, 219 F.3d 555, 557 (6th Cir. 2000) ("[T]he party seeking summary judgment is responsible for identifying which portion of the record 'demonstrates the absence of a genuine issue of material fact.'")

Even the decision in *Street v. J.C. Bradford & Company*, 886 F.2d 1472 (6th Cir. 1989), which is much maligned by Petitioner, does not support the Petitioner's contention because summary judgment was not even granted in that case.

And even if there were a conflict or ambiguity in how the *Celotex* standard has been applied in other cases, such ambiguity or conflict is irrelevant to the Petition in this case. As illustrated above, no such conflict is manifested here because the District Court's decision was consistent with the decisions of this Court in *Celotex* and the Eleventh Circuit in *Clark*. Accordingly, the petition for a writ of certiorari should be denied.

II. The District Court, which had jurisdiction based both on a federal question and on diversity, did not err by using the federal standard for summary judgment instead of the Tennessee standard.

The Petitioner's alternative grounds for review are similarly without merit. Petitioner maintains that the District Court should not have used the federal standard for summary judgment but instead should have used the Tennessee standard, which was recently addressed by the Tennessee Supreme Court in *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008).

This Court has long held that in diversity actions "federal courts are to apply state substantive law and federal procedural law". *Hanna v. Plumer,* 380 U.S. 460, 465 (1965). Where the source of the federal rule is the Federal Rules of Civil Procedure the decisive question is whether the rule governs a matter "which, though falling within the uncertain area between substance and procedure, [is] rationally capable of classification as either," *id.* at 472. If the subject matter of the federal rule is "arguably procedural" *id.* at 476 (Harlan, J., concurring), then the rule does not overstep the Rules Enabling Act and is therefore to be followed. *Id.* at 471.

Further federal rules purporting to govern procedural matters, which are duly passed by Congress, shall be presumed constitutionally valid unless they cannot rationally be characterized as rules of procedure. *Id.* at 471.

Courts have universally found that the rules for summary judgment are procedural and therefore applicable in diversity actions rather than the state summary judgment rules. *See e.g. Stickley v. State Farm Mut. Auto. Ins. Co.*, 505 F.3d 1070, 1076 (10th Cir. 2007) (In diversity cases federal courts are governed by federal law in determining the propriety of the district court's grant of summary judgment.); *Doe v. Doe*, 941 F.2d 280, 287 (5th Cir. 1991) ("Federal courts-irrespective of diversity-are to employ the summary judgment standard of Fed.R.Civ.P. 56."); *McEwen v. Delta Air Lines, Inc.*, 919 F.2d 58, 60 (7th Cir. 1990) ("Federal courts may grant summary judgment under Rule 56 on concluding that no reasonable jury could return a verdict for the party opposing the motion, even if the state would require

the judge to submit an identical case to the jury.") *Lavin v. New York News, Inc.*, 757 F.2d 1416, 1419 (3d Cir. 1985) (In diversity action, the standards for granting summary judgment are matters of federal law); *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.*, 709 F.2d 427, 430 n. 3 (6th Cir. 1983) ("[I]n this-and all other Circuits-the Federal Rules of Civil Procedure, Rule 56 standard governs summary judgment in diversity cases."); *Sullivan v. Massachusetts Mut. Life Ins. Co.* 611 F.2d 261, 263 -264 (9th Cir. 1979) ("Although California law controls the substantive issues in this case, the standards for determining whether summary judgment was appropriate call for application of federal law.").

According to the Petitioner the summary judgment standard is a "state substantive law" because it affects a litigant's right to a jury trial. (Pet. 12). Petitioner has misconstrued the test. As this Court recently stated:

> We have long held that this limitation means that the Rule must "really regulat[e] procedure,- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.

> Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us.

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co. 130 S. Ct. 1431, 1442 (2010) (citations omitted).

Rules for summary judgment neither change a plaintiff's remedies or entitlements to relief nor abridge a defendant's rights; they alter only how the claims are processed. The summary judgment process governs only "the manner and the means" by which the litigants' rights are "enforced", and are therefore procedural. *Id.*

Moreover, "there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts". *Byrd v. Blue Ridge,* 356 U.S. 525, 538 (1958). Interposing a different state rule concerning summary judgment into the federal judicial process violates this policy.

Further, the Petitioner's claim that summary judgment denies a litigant the right to a jury trial is without support. The Fifth Circuit recently considered and rejected this argument:

> [The] claim that he was denied a jury trial is frivolous. Federal Rule of Civil Procedure 56(c) requires the court to render summary judgment if the appropriate materials on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As this court has explained, "[t]he function of the jury is to try the material facts; where no such facts are in

> dispute, there is no occasion for jury trial. Thus the right to trial by jury does not prevent a court from granting summary judgment." When the district court properly entered summary judgment dismissing Baranowski's claims, his demand for a jury trial became moot.

Baranowski v. Hart, 486 F.3d 112 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 707 (2007) (citations omitted).

As early as 1902 this Court addressed itself to the question of whether the summary judgment procedure was constitutional. It stated:

> If it were true that the rule deprived the plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.
>
> Certainly a salutary purpose, and hardly less essential to justice than the ultimate means of trial.

Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315, 320 (1902).

In a further effort to show a substantive state law, Petitioner maintains that the source of the Tennessee standard is not a rule of procedure per se, but rather case law----the *Hannan* decision. Petitioner argues

that the language of the federal and the state rule do not conflict, but the summary judgment standard in Tennessee differs from the federal standard because of the Tennessee Supreme Court's decision in *Hannan*. Because of this, the Petitioner reasons that the Tennessee standard must be substantive state law. (Pet. 9).

The Petitioner's reasoning is incorrect. As a threshold matter, the Tennessee Rule 56 does in fact differ from the Federal Rule 56.[3]

More importantly though, even though *Hannan* is an important case, it nevertheless concerns the *procedure* by which Tennessee courts are to resolve summary judgment motions. The fact that there are cases interpreting and applying rules of procedure does not somehow transform such rules into substantive law. For example, this Court's ruling in *Celotex*, and the cases that have followed, have not changed the fact that summary judgment still governs

---

[3] Tennessee Rule of Civil Procedure 56 contains a subsection that has no analogue in the Federal Rules of Civil Procedure:

> 56.03. Specifying Material Facts. - In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record.

Tenn.R.Civ. P. 56.03.

"the manner and the means by which the litigants' rights are enforced" and is therefore procedural. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* 130 S. Ct. at 1442.

The Sixth Circuit in *Devonshire v. Johnston Group First Advisors*, considered the this issue. The plaintiff appealed the grant of summary judgment, maintaining that Ohio courts would have reached a different result because Ohio courts as a matter of case law did not resolve the issue of proximate cause on summary judgment. The Sixth Circuit nevertheless applied the federal rule:

> [A]ssuming that Ohio forbids its courts from determining the issue of proximate cause at the summary judgment phase, federal courts must obey Federal Rule of Civil Procedure 56(c), which instructs federal courts to grant summary judgment on substantive legal issues, proximate cause included, when there are no genuinely disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Because Rule 56(c) directly covers the summary judgment issue here, this court may apply different state law only if Rule 56(c) cannot rationally be characterized as procedural. Under this test Rule 56(c) is of course procedural.

166 Fed.Appx. 811, 814 (6th Cir. 2006) (citations omitted).

Accordingly, the District Court did not err in applying the federal standard for summary judgment in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN J. COOK
Counsel of Record
Pietrangelo Cook PLC
6410 Poplar Avenue
Suite 190
Memphis, Tennessee 38119
(901) 685-2662
jcook@pcplc.com

Counsel for Respondents Preferred Medical Systems, LLC, Jerry Kirk McGuire and Greg Reed

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment, In the United States District Court for the Western District of Tennessee Western Division (July 10, 2007) 1b

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 05-2390 V

[Filed July 10, 2007]

MEDISON AMERICA, INC., a California Corporation	)
Plaintiff,	)
v.	)
PREFERRED MEDICAL SYSTEMS, LLC, a Tennessee Limited Liability Company, JERRY K. MCGUIRE, GREGG REED, BRIAN KEITH, MIKE BUCHKO, and GENERAL ELECTRIC COMPANY, a New York Corporation	)
Defendants,	)

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

For purposes of summary judgment only, Defendants Preferred Medical Systems, LLC ("Preferred Medical"), Jerry K. McGuire ("McGuire"), and Greg Reed ("Reed") (collectively "Defendants") file this Statement of Undisputed Material Facts in support of their Motion for Summary Judgment pursuant to Rule 56 and in accordance with LR7.2(d), and state as follows:

1. The Plaintiff Medison America, Inc. ("Plaintiff" or "Medison America") is a California corporation. The Plaintiff is owned by Medison Co., Ltd. ("Medison, Ltd."), a Korean company. Medison, Ltd. manufactures ultrasound equipment. [*See* First Amended Complaint, Dkt. No. 2 ("Amended Complaint") ¶¶ 1-3].

2. The Plaintiff Medison America sells ultrasound equipment throughout the United States. The ultrasound equipment sold by the Plaintiff is manufactured by Medison, Ltd., a Korean Company [*See* Amended Complaint, ¶¶ 33-34].

3. General Electric Company ("GE"), a New York corporation, manufactures ultrasound equipment. [*See* Amended Complaint, ¶ 27; Declaration of Jerry Kirkland McGuire ("McGuire Declaration") ¶ 3, attached as SJ Exhibit 2.].

4. Preferred Medical Systems, LLC ("Preferred Medical") is a Tennessee limited liability company. [*See* Amended Complaint, ¶ 24].

5. Preferred Medical is an independent manufacturer's representative for GE in the sale of ultrasound equipment, serving such capacity in the

States of Tennessee, Mississippi, Alabama, Arkansas, Louisiana and Georgia. [*See* McGuire Declaration ¶ 4]

6. There are at least 3,000 potential purchasers of ultrasound equipment in the OB/GYN market within the States of Tennessee, Mississippi, Alabama, Arkansas, Louisiana and Georgia [*See* McGuire Declaration ¶ 5].

7. GE has at least 23 service and support personnel in the States of Tennessee, Mississippi, Alabama Arkansas, Louisiana and Georgia to repair and service ultrasound equipment. [*See* McGuire Declaration ¶ 6, S.J. Exhibit 2]

8. Plaintiff only has two (2) service and support personnel in the United States, both of whom reside in California. Plaintiff's Rule 30(b)(6) designated corporate representative testified as follows:

Q. You told us earlier that Medison has, I think, 16 employees?

A. No, I said 19.

Q. Nineteen. Are any of those employees service technicians?

A. Two of them.

Q. Where do they -- where do they reside?

A. They work out of the head office.

Q. That's in California?

A. Yes.

[*See* Deposition of Medison America, Inc., by and through its corporate designee, Robert DePalma ("Medison Dep."), taken on March 9, 2007, p. 161. Copies of the pertinent portions of the Medison Dep., cited herein, are attached collectively as SJ Exhibit 3].

9. In January 2002, Medison America's parent company Medison, Ltd. entered into a receivership procedure in Korea wherein its primary lender assumed joint control of the company along with Medison, Ltd.'s existing management. Plaintiff alleged this fact as follows:

> In January 2002, in a receivership procedure unique to the law of Korea, Medison Ltd. became co-managed by the chief executive officer of Medison Ltd, with Medison Ltd.'s governing board of directors and Medison Ltd.'s chief lender, Hana Bank, Seoul Korea.

[*See* Amended Complaint, ¶ 5].

10. In a memorandum to the Plaintiff Medison America, the Korean legal counsel for Medison, Ltd. stated that the reorganization proceedings in Korea were similar to chapter 11 proceedings in the Untied States (the "Korean Legal Memo"). The Korean Legal Memo stated in relevant part:

> Medison is currently undergoing corporate reorganization proceedings under the Company Reorganization Act of Korea **(which is similar to Ch. 11 proceedings in the U.S.)**

[*See* Exhibit 11 to Medison Dep., which is attached hereto as part of collective SJ Exhibit 3, (emphasis added)].[1]

11. The reorganization proceedings were conducted under the Company Reorganization Act of Korea, which states the following as its purpose:

> The purpose of this Act is to coordinate the interest of creditors, stockholders and other interested persons, and to strive for the reorganization and recovery of the business, in respect of any joint stock company (hereinafter in this Act referred to as the "company") **which faces imminent bankruptcy due to poor financial circumstances**, but which is likely to recover economically.

[*See* Company Reorganization Act of Korea, Article 1 (emphasis added), a copy of the Company Reorganization Act of Korea is attached as S.J. Exhibit 5.][2]

---

[1] The receipt and authenticity of the Korean Legal Memo has been confirmed by the Plaintiff. [See Response of Medison America, Inc. to General Electric Company's First Request for Admission ("Plaintiff's Admissions") No. 38. Copies of the pertinent portions of the Plaintiff's Admissions, cited herein, are attached collectively as S.J. Exhibit 4.]

[2] The Plaintiff has raised the issue of Korean law in its Amended Complaint by alleging that the receivership proceeding of Medison, Ltd. was "unique to the law of Korea" [Amended Complaint ¶ 5] and by contending that using the word "bankruptcy" to describe the Korean reorganization proceeding is false and deceptive. [Amended Complaint ¶¶ 5-9] Accordingly, this court may consider the references to the Company Reorganization

12. Under the Company Reorganization Act of Korea, a company in the reorganization proceedings may be liquidated in certain circumstances. [*See* Company Reorganization Act of Korea, Article 191 (Programs for Liquidation), S.J. Exhibit 5]

13. Plaintiff's own auditors described Medison, Ltd.'s proceedings as a "bankruptcy" in a note to the Plaintiff's 2003/2004 Financial Statements. [*See* Exhibit 13 to Medison Dep., Note 4 "Related Party Transactions", p. 12, which is attached as part of S.J. Exhibit 3 hereto]

14. The United States Bankruptcy Court for the Southern District of New York described the proceedings under the Company Reorganization Act of Korea as follows:

> The record confirms that Korean bankruptcy law, and in particular the Company

---

Act of Korea above and other relevant materials pursuant to Fed.R.Civ.P. 44.1, which provides as follows:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Fed.R.Civ.P. 44.1. The Advisory Committee Notes to Rule 44.1 provide that "[i]f notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties."

> Reorganization Act, is substantially similar to United States law.

In re Petition of Kyu-Byung Hwang, 309 B.R. 842, 846 (Bankr.S.D.N.Y. 2004) (affording comity to Korean reorganization proceeding).[3]

15. According its own financials statements, the Plaintiff Medison America had a multi-million dollar deficit in the year 2003, with liabilities exceeding its assets by $25,845,091, and a multi-million dollar deficit in the year 2004, with liabilities exceeding its assets by $24,671,941. [*See* Exhibit 13 to Medison Dep., pp. 4-5 which is attached as part of SJ Exhibit 3 hereto]

16. Plaintiff, through its Rule 30(b)(6) corporate representative Robert DePalma, confirmed the accuracy of the Plaintiff's financial statements. DePalma testified:

> Q. And whose job was it to go over these financial statements?
>
> A. [DePalma] This would be Victoria Murphy, and these were all audited by the same audit team that we used up until last year.
>
> Q. Who is that audit team?

---

[3] This Honorable Court may take judicial notice of this opinion. *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980) ("Federal courts may take judicial notice of proceedings in other courts of record.").

A. I'd have to check. Its name escapes me.

Q. But someone would review these to ensure that these obviously were accurate --

A. Absolutely.

Q. -- financial statements?

A. Yes.

Q. And so, all of the statements made in there would be accurate and -- as far as you would know as a representative of the company?

A. Yes.

[*See* Medison Dep., pp. 158-59].

17. Plaintiff's Complaint alleges that Defendants made certain disparaging statements to potential purchasers, and Plaintiff's Rule 26 Disclosures lists prospective customers that it contends did not purchase its product because of the alleged disparaging statements. [*See* Amended Complaint, ¶¶ 129-148; and, Plaintiff's Rule 26 Disclosures, Exhibit A, a copy of the cited portions of which is attached hereto as SJ Exhibit 6]. These two documents, as cited and collectively, identify the universe of customers to whom Plaintiff alleges Defendants made disparaging statements about Plaintiff and/or its products (hereinafter, the identity of the prospective customers shall be referred to as the "Prospective Customers").

18. None of the Prospective Customers owned Medison ultrasound equipment prior to the time of the alleged statements. [*See* Plaintiff's Admissions No. 30, S.J. Exhibit 4]

19. Defendants Preferred Medical, McGuire and Reed did not make any false or misleading statements of fact concerning the Plaintiff or Plaintiff's products or services to the Prospective Customers. [*See* McGuire Declaration ¶¶ 7-8, SJ Exhibit 2; and, Declaration of Greg Reed ("Reed Declaration") ¶¶ 7-8. A copy of the Reed Declaration is attached hereto as SJ Exhibit 7.]

20. In its Response to Interrogatories, the Plaintiff stated that the information upon which it based the Amended Complaint came "exclusively from" Mark Patterson, Mary Margaret Little and Cheryl Martin. [*See* Plaintiff's Answer To Defendant General Electric Company's First Interrogatories To Plaintiff, Answer No. 1, attached hereto as S.J. Exhibit 8]. Plaintiff added one more individual to this list, Martin Harris, during its deposition. [*See* Deposition of Medison America, Inc., by and through its corporate designee, Robert DePalma ("Medison Dep."), taken on March 9, 2007, pp. 101-107, attached as S.J. Exhibit 3]

21. Plaintiff's witness Mark Patterson has an agreement with Bio-Core, Inc. to assist them in the sale of Medison ultrasound equipment. [*See* Deposition of Mark Patterson, taken on March 23, 2007 and on May 21, 2007 ("Patterson Dep."), p. 17, Copies of the portions of Patterson Dep. cited herein are attached collectively as SJ Exhibit 9.]. Patterson's company and Bio-Core, Inc. are the exclusive distributors of Medison ultrasound equipment in the States at issue in the Amended Complaint. [*See* Patterson Dep., pp. 36-37].

Mr. Patterson testified during his deposition about allegedly disparaging statements made to the Prospective Customers. Mr. Patterson admitted that he was not present at the time that the statements were made and that all of his information as to whether Defendants made these statements is based upon the out of court statements of third parties. He testified:

> Q: Okay. And let me just make sure I understand the basis for your knowledge on all of these.
>
> A: [Patterson]: Sure.
>
> Q: As to the doctors identified on Exhibit 3, you were not present when the alleged statement was made by the GE representative, correct, or the Preferred Sales person?
>
> A: That's correct. I was not present during that —
>
> Q: You were not present to actually hear the statement from the sales representative, correct?
>
> A: Correct.
>
> Q: And so you are getting the information second-hand from a doctor or another employee in the office; is that right?
>
> A: That's correct.

[*See* Patterson Dep., p. 144, S.J. Exhibit 9; *see also* Patterson Dep., p. 302, S.J. Exhibit 9]

22. Patterson also testified that he did not have any documents containing the allegedly disparaging statements given by the Defendants to any Prospective Customer.

> Q. You don't have any documents that were given to doctors by Preferred Medical or GE that contain these alleged disparaging statements, right?
>
> A. [Patterson] Right.

[*See* Patterson Dep., p. 304].

23. Plaintiff's witness Martin Harris is the sole shareholder and an employee of Biocore, Inc. [*See* Deposition of Martin Harris, taken on May 25, 2007 ("Harris Dep."), p. 25, Copies of the portions of Harris Dep. cited herein are attached collectively as SJ Exhibit 10.] Harris also testified during his deposition about allegedly disparaging statements made to some of the Prospective Customers. However, like Patterson, Harris admitted that he was not present at the time that the alleged statements were made and that he did not hear the Defendants make the alleged statements.

> Q. First I want to focus on whether you, Martin Harris, have ever heard a Preferred Medical representative make a disparaging statement about Medison; have you actually been present and heard such a statement?
>
> A. [Harris] No.

Q. Have you ever heard Preferred Medical make a disparaging statement about Bio-Core?

A. No.

Q. Thank you. Same context, have you personally heard a Preferred Medical representative make a disparaging statement about Medison's products?

A. No.

Q. Or Bio-Core's products?

A. No.

Q. Have you ever seen any documents that you have any reason to believe were created by Preferred Medical that made disparaging statements about Medison?

A. No.

Q. About Medison's products?

A. No.

Q. About Bio-Core?

A. No.

[*See* Harris Dep., pp. 123-124, S.J. Exhibit 10]

24. Plaintiff's witness Mary Margaret Little is the sister of Defendant Kirk McGuire and is a former

employee of Preferred Medical. Ms. Little's employment with Preferred Medical terminated on or about July 27, 2004. [*See* Deposition of Mary Margaret Little taken on March 19, 2007 ("Little Dep.") pp. 20, 23. A copy of the portions of the Little Dep. cited herein are attached collectively as SJ Exhibit 11.]

25. Ms. Little testified that while working for Preferred Medical she had made allegedly disparaging statements about Medison, but during her deposition she could not identify any specific customer to whom such statements were made:

> Q. Can you identify one of those customers for me?
>
> A. [Little] There was one in -- up around Fayetteville, Arkansas.
>
> Q. Do you remember the name?
>
> A. I believe I've given it to Mr. Parrish, but I don't recall it off the top of my head.
>
> Q. Any other customers that you remember telling that story to, and by that story, I mean what you've described you would say about Medison?
>
> A. Yeah. Every customer that was a potential 3D, 4D customer that brought that up was told that story.
>
> Q. Well, let's talk about what you told customers first. Okay.

A. By me, that's what I'm saying, by me.

Q. And I understand -- I understand your answer. But what I'm asking you is slightly different. And I'm asking you if you remember the identity of any specific customers who you told that story to?

A. If you can get the list of the sales that I made when I was in new equipment, then I can identify them.

Q. So sitting here today, you don't know the answer?

A. I don't remember the names.

[*See* Little Dep., p. 109, SJ Exhibit 11].

26. Ms. Little similarly failed to identify the customers who allegedly heard statements made by Preferred Medical employee Scott Martin, or even what Mr. Martin may have said to them. She testified:

Q. How many specific times can you remember?

A. [Little] I would say probably three, but I wasn't there long when -- after he got there.

Q. And each time he said it, did he say the entire litany that you have given, or did he say part of it? What did he say each time?

A. I don't know.

Q. What customer was he [Scott Martin] talking to?

A. I don't know. A customer who was interested in Medison.

[*See* Little Dep., p. 105, SJ Exhibit 11].

27. Ms. Little similarly failed to identify the customers who allegedly heard statements made by Preferred Medical employee Kim Wilson:

Q. What customer was she [Kim Wilson] speaking to?

A. I have no idea.

[*See* Little Dep., pp. 103-104, SJ Exhibit 11].

28. During her deposition, Ms. Little identified only one specific customer to whom Defendant Kirk McGuire allegedly made a statement. However, Ms. Little testified that she did not actually hear the statement.

Q. Tell me what customer he [Kirk McGuire] told that Medison was in bankruptcy?

A. I don't know their names.

Q. Do you know any customer he made any of the statements you've just listed to?

A. I believe a Dr. Sigman out of Alabama.

Q. Were you present when Mr. McGuire spoke with Dr. Sigman?

A. No. But I heard him going down the hall, talking about he had told him the Medison story.

Q. **Okay. Did you hear Mr. McGuire make any statements to Dr. Sigman?**

A. No.

Q. Were you there when he did the demo?

A. No.

Q. Were you there when he made phone calls to Dr. Sigman?

A. I may have been present for some of those.

Q. Well, were you?

A. I don't know. There were lots of times that I sat in on -- when he was on calls. And I don't remember now what doctor he was speaking with.

Q. And that's all I'm asking, okay. I'm just asking you what you do know and what you don't know.

A. Okay.

Q. Okay. Now, what statement -- what statement did you hear him make about his conversation with Dr. Sigman?

A. That he had told him the Medison story. He was going to take a different look -- take another look.

Q. Anything else that you heard him say about his conversation with Dr. Sigman?

A. That Dr. Sigman had some financial problems. He didn't know that he was going to be able to get leased anyway, something to that effect about his credit not being good. Something like that.

Q. Anything else?

A. Not that I remember.

[*See* Little Dep., pp. 113-115 (emphasis added), SJ Exhibit 11].

29. In her affidavit dated January 16, 2006, Ms. Little mentioned another customer "Dr. Scott Smith", but again Ms. Little did not hear what McGuire was alleged to have said to this customer. Ms. Little claims that she was with the customer but McGuire was not and had allegedly made the statements to the customer through her cell phone.

He got the customer – **had me give my cell phone to the customer** so he would make sure that the customer heard the story. I'm

> pretty sure that office went with us instead of Medison because they were afraid.

[*See* Affidavit of Mary Margaret Little, executed on January 16, 2006, ("Little Aff.") p.28. (emphasis added)]. A copy of the entire affidavit was filed by Plaintiff on or about August 25, 2006, Dkt. No. 30. Portions of the Little Aff. cited herein are attached as SJ Exhibit 12]

30. Additionally, "Dr. Scott Smith" is not listed among the doctors included in Plaintiff's list of Prospective Customers. [*See* Amended Complaint, ¶¶ 129-148 (Dkt No. 2) and Plaintiff's Rule 26 Disclosures, Exhibit A, SJ Exhibit 6].

31. The only other specific customer mentioned by Ms. Little in her Affidavit is an OB practice in New Albany. However, Ms. Little testified that the customer's decision to purchase a GE product rather than a Medison was based upon negative information he had received from a Medison customer, not from the Defendants:

> Well, I ran across a doctor in New Albany in the summer (of 2005) who told me that he was interested in Medison equipment, but he was going to go with GE **because he had spoken with a customer of Medison, and the service was horrible.**

[Little Aff. p. 27 (emphasis added), S.J. Exhibit 12]

32. Ms. Little also did not speak to any potential purchaser about their reactions to the alleged statements. She testified:

Q. Can you identify any doctors who you have spoken to about how the Medison story influenced their decision to buy or not to buy from Medison, any doctors who you have actually spoken to about their reaction to anything said about Medison?

A. That I've spoken to about their reaction?

Q. Yes, ma'am.

A. I haven't spoken to any doctors about their reaction.

Q. Anybody who was making the purchasing decision at a doctor's office?

A. It may be the lady in Louisiana that told the story about the screwdriver. But, I mean, she wasn't going to buy Medison anyway.

Q. Well, she told the Medison story, right?

A. Right. But, I mean, it was -- her reaction was that, you know, they weren't going to even consider them because it was so bad -- the service was so bad.

Q. Anybody else?

A. I didn't talk to people about their reactions to the Medison story.

[*See* Little Dep., p. 115 (emphasis added), SJ Exhibit 11].

33. Finally, Ms. Little's never heard Defendant Greg Reed make disparaging statements about the Plaintiff. She testified:

> Q: Have you ever heard Gregg Reed make any disparaging statement about Medison?
>
> A. No.
>
> Q. Did you tell Mr. DePalma that?
>
> A. I don't think that he and I discussed anything specific. It was general, what we talked about was general.

[*See* Little Dep., p. 110, SJ Exhibit 11]

34. Plaintiff's witness Cheryl Martin is a former applications technician who worked for GE and Preferred Medical on a contract basis from time to time. [*See* Affidavit of Cheryl Martin, executed on January 31, 2006, ("Martin Aff.") pp. 14, 15, 37, 38. A copy of the entire affidavit was filed by Plaintiff on or about August 25, 2006, Dkt. No. 31. Portions of the Martin Aff. cited herein are attached collectively as S.J. Exhibit 13]

35. Ms. Martin only testified about one specific incident involving Medison and a potential purchaser. The incident involved a doctor in Alabama and allegedly occurred in the Fall of 2003. At the time, Martin was not working for Preferred Medical and was only in the doctor's office for purely personal reasons. Ms. Martin had accompanied her daughter who was pregnant at the time to her daughter's doctor's office

for an ultrasound. Her testimony about the incident is as follows:

> CLM: My daughter called me last week and told me that her doctor---I don't know his first name, but the office is Brown McCool in Fairhope, Alabama just purchased a Voluson. The doctor had Medison before. I thought when she was pregnant the first time, in 2003, I went there, in the fall of that year, and I went with her for her ultrasound. The girl started the scan, and I thought: how did she get a Medison? They had just gotten it. I feel horrible telling you this, but I said: "Did you know that they were in bankruptcy?" She said, "No!" And what I heard from my daughter last week that they pulled that Medison and that GE now has a Voluson in there. My daughter will be the first patient that the doctors use the Voluson on this week or next.

[*See* Martin Aff., p. 52, SJ Exhibit 13].

36. The Plaintiff's corporate representative admitted that Plaintiff has received complaints from its customers. The corporate representative stated:

> Q. When was the last time you talked to Mr. Ghilduyal about the frequency of complaints that he gets from customers?
>
> A. We have one situation in Missouri that's going on right now, but it's the only one that I know in quite some time.

[Medison Dep., p. 174, S.J. Exhibit 3]

37. At least one of these complaints, as Plaintiff admits in the Amended Complaint, ripened into a lawsuit against Plaintiff in Alabama. In May 2003, the Plaintiff was sued in a case styled *George V. Seir, DVM, et al. v. Medison America, Inc.*, No. 02-087-B (Circuit Court Autauga County, Alabama). The suit alleged among other things that Medison America "negligently repaired the equipment or negligently failed to repair the equipment on numerous occasions." As of the commencement of the present action, this lawsuit in Alabama was pending and unresolved. [*See* Amended Complaint ¶¶ 65-71.]

38. Plaintiff has admitted that Defendants have not exercised dominion and control over any property of the Plaintiff. [Medison Dep. pp. 252-253, S.J. Exhibit 3]

39. Plaintiff has admitted that Defendants have not interfered with any contracts Plaintiff may have with third parties. [Medison Dep. pp. 253-254, S.J. Exhibit 3]

Respectfully submitted,

/s/ Jonathan P. Lakey
JONATHAN P. LAKEY (16788)
ANTHONY PIETRANGELO (15596)
PIETRANGELO COOK PLC
6410 Poplar Ave, Suite 190
Memphis, TN 38119
(901) 685-2662
jlakey@pietrangelocook.com

Counsel for Defendant Preferred Medical Systems, LLC and Jerry Kirk McGuire.

* * *

[*Certificate of Service omitted in printing of this appendix*]

169

(3)

No. 09-1372

In the Supreme Court of the United States

MEDISON AMERICA, INC.,
a California corporation,

Petitioner,

v.

PREFERRED MEDICAL SYSTEMS, LLC,
a Tennessee limited liability company;
JERRY K. MCGUIRE AND GREGG REED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

LARRY E. PARRISH
Counsel of Record
Parrish and Shaw
An Association of Attorneys
775 Ridge Lake Boulevard
Suite 145
Memphis, Tennessee 38120
(901) 766-4388
parrish@parrishandshaw.com

Attorney for Petitioner

August 24, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Table of Contents

Table of Contents i

Table of Authorities ii

Petitioner's Reply Brief 1

Table of Authorities

Cases

Catrett v. Johns-Manville Sales Corp.,
826 F.2d 33 (D.C. Cir. 1987), *cert. denied*,
484 U.S. 1066 (1988) 1, 2

Hannan v. Alltel Publ'g Co.,
270 S.W.3d 1 (Tenn. 2008) 2

Semtek Int'l Inc. v. Lockheed Martin Corp.,
531 U.S. 497 (2001) 7

Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,
807 S.W.2d 476 (Ky. 1991) 2

Other Authorities

Adam N. Steinman, "*The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*," 63 Wash & Lee Rev. 81 (2006) 1

Adam N. Steinman, *What is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 Notre Dame L. Rev. 245 (2008) 6

Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 Iowa L. Rev. 1613 (2008) 4

Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 Va. L. Rev. 139 (2007) 4

Suja A. Thomas, *Why Summary Judgment is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 Iowa L. Rev. 1667 (2008) 3

PETITIONER'S REPLY BRIEF

A lengthy reply is unnecessary in this case. The Respondent's own statement of the district court's basis for entry of summary judgment (Brief in Opposition at 21-30) demonstrates that the law of summary judgment in the federal courts is in disarray.[1] The district court — applying what the Respondents characterize as the correct view of *Celotex* — weighed the evidence, ignored permissible factual inferences, and demanded proof from the plaintiff of such quality that the summary judgment motion amounted to a mini-trial rather than a determination of whether there was a genuine issue of material fact to be tried.

The proceedings here echo the proceedings on remand in *Celotex* itself. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). Writing the opinion for the D.C. Circuit, Judge Starr opined that shifting the burden to the nonmovant did not mean that the nonmovant had to try her case on summary judgment. Judge Starr explained that summary judgment was improper because "the issue of exposure [to asbestos] was not so one-sided that Celotex was entitled to judgment as a matter of law." *Id.* at 39.

Dissenting, Judge Bork opined that summary judgment was proper because plaintiff had failed to produce "specific facts" (i.e., a witness with firsthand

---

[1] See Stemmman, Adam N, "*The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*," 63 Wash & Lee Rev. 81 (2006).

personal knowledge) in the form of admissible evidence. *Id.* at 41-42 (Bork, J., dissenting). The logical extension of Judge Bork's opinion is that circumstantial evidence would not be enough for a nonmovant to turn back a summary judgment.

The primary contrast in the Starr view and the Bork view is that the former denies summary judgment on indirect evidence (to be taken in the light most disfavorable to the movant with all reasonable inferences drawn against the movant and in favor of the nonmovant) while the later denies summary judgment only if the nonmovant produces admissible at-trial direct evidence (e.g., eyewitness) sufficient to prove (not just dispute the movant's evidence) the nonmovant's case. This is an apples-oranges difference, but both, now, are travelling full bore in the law under the same "summary judgment" label, resulting in inter-Circuit and intra-Circuit splits in application.

The Starr view focuses on the creation of a genuine issue of material fact by conflicting evidence while the Bork view focuses on the quantum and quality (i.e., weight) of a plaintiff's evidence once a defendant shifts its burden.

What occurred in the courts below is an example of the ways this Court's summary judgment precedent continues to be ignored. All 50 states could adopt *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991) and *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008). Such a state of the law would force upstanding litigators to forum shop (i.e., plaintiffs must always avoid federal courts and defendants must always remove to federal court) at

risk of malpractice for failing zealously to represent a client.

Clearly, the district court here followed the Bork view to the exclusion of the Starr view. The district court below permitted the defendant to shift the burden of production to the plaintiff by merely summarizing the evidence in the form it surfaced during pretrial discovery.

Although the issue on remand in *Celotex* was the nonmovant's response, rather than the movant's motion, the decision on remand illustrates the danger that the interpretation of *Celotex* adopted by the district court here will result in a mini-trial with no live witnesses and no jury to weigh the cumulative effect of all of the in-person testimony after assessing each witness's credibility. By requiring so little of the movant here, the district court's interpretation of *Celotex* failed to focus the inquiry on a particular element of any particular cause of action alleged by plaintiff. Instead, the district court forced the plaintiff, at the pretrial discovery stage, to produce *all* its evidence, in admissible form, on *every* theory, transforming the district court from an arbiter of whether there was a factual dispute into an arbiter of the factual disputes – a fact-finder.

If, as Respondent contends, this is a correct application of *Celotex*, then the argument that summary judgment is unconstitutional becomes urgent; instead of a jury trial, the nonmovant gets a bench trial, in violation of its right to a jury trial under the Seventh Amendment. *See* Suja A. Thomas, *Why Summary Judgment is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 Iowa L. Rev. 1667

(2008); Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 Iowa L. Rev. 1613 (2008); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 Va. L. Rev. 139 (2007).

The district court's application of *Celotex* also demonstrates why the *Erie* doctrine, or the Rules Enabling Act, require that federal courts sitting in diversity cases apply state summary judgment standards.

Where state law, like Tennessee's, requires the movant to negate an essential element of the nonmovant's case in order to shift the burden to a nonmovant, summary judgment is not transformed into a mini-bench trial on a paper record. Instead, the negation requirement focuses the nonmovant's and the court's attention on each specific element of each specific theory, one by one, and permits the proper question to be asked: Is there a genuine issue of material fact with regard to each particular element, separately considered?

Contrary to Respondent's suggestion (Brief in Opposition at 32-38), the issue of whether the state or federal summary judgment law should apply in diversity cases cannot be answered by merely labeling summary judgment "procedural." True, the term "procedural" can be used as a shorthand *post hoc* label for a federal law that can constitutionally be applied in diversity actions, while "substantive" is a shorthand *post hoc* label for state laws that the Constitution requires to be applied in diversity actions. Using these labels, summary judgment is "substantive."

Professor Adam Steinman has cogently explained one of the ways in which summary judgment is substantive:

> When a court applies a summary judgment standard under which it declares the evidentiary material generated by the parties' primary conduct to be inadequate as a matter of law, it is in a very real sense dictating the legal consequences of the primary conduct itself and, therefore, modifying substantive rights. Consider the variety of primary-activity regulations that hinge on the defendant's intent or state of mind. To make out a state law consumer fraud claim, a plaintiff might have to prove that the defendant acted with scienter, that is, knowledge that its statements about its product were false. In an employment discrimination case a plaintiff may have to prove that the defendant's decision was based on race, gender, or some other impermissible factor. Frequently, the defendant's primary conduct will not generate smoking gun evidence of the defendant's state of mind. Thus plaintiffs often must rely on **indirect evidence**. In a consumer fraud case, a plaintiff may point to contemporaneous information contradicting the defendant's representations, even if there is **no direct evidence** that the defendant knew about that information at the time. In an employment discrimination case, a plaintiff may point to evidence undermining the defendant's purported justification for its employment decision, even if there is **no direct evidence** that the real motivation was unlawful discrimination. A state court may look at the

> plaintiff's **indirect evidence** and find it sufficient to sustain a jury verdict in plaintiff's favor. But a federal court, applying the more stringent federal approach to summary judgment, might find the **indirect evidence** legally insufficient. The evidence a plaintiff can use to prove its case, however, is ultimately a function of the defendant's primary conduct. If a state court would allow that evidence to sustain a jury verdict in the plaintiff's favor, but a federal court would mandate judgment as a matter of law against the plaintiff, there is a stark contrast in the ability of plaintiffs to enforce their state law substantive rights. (emphasis added)

Adam N. Steinman, *What is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 Notre Dame L. Rev. 245, 289-90 (2008) (applying an REA analysis and noting that the argument is even stronger under the aegis of an "unguided *Erie* choice").

As pointed out in the Petition in this case, the federal courts uniformly apply state law directed verdict standards in diversity cases, recognizing that the question of the **sufficiency of the evidence** to support a verdict **is a "substantive"** one. *See also* Steinman, *supra*, at 290-93.

To the extent *Celotex* advances the directed verdict inquiry to the summary judgment stage, the practice of the federal courts themselves demonstrates that summary judgment is "substantive." Where federal law permits the entry of a judgment on the merits (and summary judgment indisputably is a judgment on the

merits) without requiring negation by the movant, the nonmovant can be deprived of a substantive right – its very cause of action – under federal law when it would not be so deprived under state law. Principles of federalism will not tolerate such a result. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001).

This case presents vitally important questions of federal law that require decision by this Court. Therefore, the Petition for Certiorari should be granted.

Respectfully Submitted,

LARRY E. PARRISH
Counsel of Record
Parrish and Shaw,
An Association of Attorneys
775 Ridge Lake Blvd., Suite 145
Memphis, Tennessee 38120
(901) 766-4388
parrish@parrishandshaw.com

Attorney for Petitioner,
Medison America, Inc.